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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-460

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

SUBURBAN TRANSIT CORPORATION AND H.A.M.L. CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Writ of Certiorari and Appendices in Support Thereof

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TABLE OF CONTENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit 1

Citations to Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement 3

Reasons for Granting the Writ 4

Conclusion 7

CASES CITED:

Building Trades Council v. Garmon, 359 U.S. 236 5

Garner v. Teamsters Union, 346 U.S. 485 6

I.L.G.W.U. v. N.L.R.B. 366 U.S. 731 (1961) 6

Motor Coach Employees v. Lockridge, 403 U.S. 274 5

N.L.R.B. v. Air Masters Corp., 339 F.2d 553 (C.A. 3, 1964) 4, 5

N.L.R.B. v. Eckland Leather Co., 114 F.2d 221 (C.A. 3, 1940) 4

N.L.R.B. v. Midwest Piping Co., 63 N.L.R.B. 1060 (1945) 4

TABLE OF CONTENTS

CASES CITED:

N.L.R.B. v. Signal Oil & Gas Co.,
303 F.2d 785 (C.A. 5, 1962) 5, 6

N.L.R.B. v. Swift & Co.,
294 F.2d 285 (C.A. 3, 1961) 3, 5, 6

Playskool Inc. v. N.L.R.B.,
477 F.2d 66 (C.A. 7, 1973) 5

St. Louis Packing Co. v. N.L.R.B.,
291 F.2d 700 (C.A. 7, 1961) 5

STATUTES CITED:

National Labor Relations Act,
as amended (61 Stat. 136, 73 Stat.
519; 29 U.S.C. Sec. 151, et seq.) 2

Section: 8(a)(1)(2) and (3) 2

Section: 9(c)(d) and (e) 2

Section: 10(e)and (f) 2, 3

28 U.S.C. Section 1254(1) 2

29 U.S.C. 158(a)(1)(2) and (3) 2, 3

29 U.S.C. 159(c)(d) and (e) 2

29 U.S.C. 160(e) and (f) 2, 3, 4

TABLE OF CONTENTS

APPENDIX

Appendix A
Decision and Order of N.L.R.B. 1a

Appendix B
Opinion and Judgment of 3rd Circuit Court of Appeals 42a

Appendix C
(Text of Statutes Cited) 70a

SUPREME COURT OF THE UNITED STATES

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No. _____

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

SUBURBAN TRANSIT CORPORATION AND H.A.M.L. CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 22, 1974.

CITATIONS TO OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 203 NLRB 69 and is printed in Appendix A. The opinion and judgment of the Third Circuit Court of Appeals is printed in Appendix B and is reported in 499 F.2d 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the Third Circuit Court of Appeals, among other Circuit Courts, has exceeded its authority by modifying the National Labor Relation Board's election policy in the Midwest Piping Doctrine by its misapplication of the substantial evidence rule and by substituting its own election policy concerning this Doctrine?

STATUTES INVOLVED

The statutory provisions involved are:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. Sec. 151, *et seq.*):

Sections: 8(a)(1)(2) and (3)
9(c)(d) and (e)
10(e) and (f)

29 U.S.C. 158(a)(1)(2) and (3)
29 U.S.C. 159(c)(d) and (e)
29 U.S.C. 160(e) and(f)

STATEMENT

The contract between the incumbent labor union and Respondent expired on September 14, 1971. A proposed new contract was rejected by the employees on the date of expiration. Subsequently, Petitioner, a rival labor organization, filed a representation petition supported by at least thirty percent of the employees in the bargaining unit. Labor Management Relations Act 9(c)(d) and (e); 29 U.S.C. 159(c)(d) and (e), Statement of Procedure Sec. 101.18(a). Respondent was notified of said petition on October 1, 1971 and immediately thereafter signed a new contract with the incumbent union. Petitioners filed an unfair labor practice charge on December 7, 1971 pursuant to the Labor Management Relations Act 8(a)(1)(2) and (3), 29 U.S.C. 158(a)(1)(2) and (3). The matter was heard by a National Labor Relations Board, (hereinafter, the Board) hearing officer on November 27, 1972. Respondent was found to be in violation of the Act sections *supra*. Upon review, the Board's Division of Judges, basing their decision on the *Midwest Piping Doctrine*, 63 N.L.R.B. 1060 (1945), sustained the findings.

Respondent then appealed to the Third Circuit of the United States Court of Appeals as per Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f). That Court reversed the findings of the Board as to all but the charge of surveillance of union activities which it upheld and remanded to the Board Section 8(a)(1), 29 U.S.C. 158 (a)(1). In reversing the Board, the court relied on *NLRB v. Swift & Co.*, 294 F.2d 285 (C.A. 3, 1961) deciding that the Board erred in finding a real question of representation.

REASONS FOR GRANTING THE WRIT

1. The decision in the instant case is one of the many decisions throughout all the Circuits which depict the conflict between the National Labor Relations Board and the Federal Circuit Courts of Appeal. The conflict arises in the application of what is known as the Midwest Piping Doctrine. The doctrine is derived from the Board's decision in *N.L.R.B. v. Midwest Piping*, 63 N.L.R.B. 1060 (1945). The doctrine in essence precludes the recognition of either rival union and demands that a Company remain neutral so long as there exists "a real question concerning representation." As stated in *N.L.R.B. v. Air Masters Corporation*, 339 F.2d 553 (C.A. 3, 1964), the difficulty arises in determining whether a real question exists.

The existence of a real question concerning representation is a factual determination. It is a determination which is rendered by the National Labor Relations Board. *N.L.R.B. v. Eckland Leather Co.*, 114 F.2d 221 (C.A. 3, 1940). This determination is either followed by the parties or litigated further to the Circuit Court of Appeals. 29 U.S.C. 160(e) and (f).

It is here that the conflict arises. The Board takes the position that a real question of representation exists whenever there are rival unions competing for representation and a petition for certification is filed. The Company must remain neutral and allow the employees to choose freely which union they desire to represent them. The Board feels compelled to support its election policy and allow the employees to make their decision protected by the confines of a voting booth.

The Circuit Courts, however, maintain that the Board's finding that a real question of representation exists is not supported by substantial evidence whenever there is a showing that one union appears to represent a majority of

the employees. *N.L.R.B. v. Swift & Co.*, 294 F.2d 285 (C.A. 3, 1961); *St. Louis Packing Co. v. N.L.R.B.*, 291 F.2d 700 (C.A. 7, 1961); *N.L.R.B. v. Air Masters Co.*, 339 F.2d 553 (C.A. 3, 1964); *N.L.R.B. v. Signal Oil & Gas Co.*, 303 F.2d 785 (C.A. 5, 1962). The Court allows the employer to depart from its position of neutrality, enabling it to bargain with such union and forego the Board election procedure. The Courts choose to support a system which in the short run is more expedient but subjects the employees' free choice to contamination by insidious influences, unreliable calculations of majority status and the possibility of prolonged legal proceedings such as the case at bar. This conflict is recognized in the decision of *Playskool, Inc. v. N.L.R.B.*, 477 F.2d 66 (C.A. 7, 1973) and in the dissent in the instant case.

In effect, the Circuit Courts are usurping the power of the National Relations Board invested by Congress to regulate the field of labor relations by injecting the Court's own policy determination as to whether an election should be held and rejecting the Board's expertise. This usurption is achieved by reversing the Board's decision that a real question of representation exists and holding that the Board's decision is not supported by substantial evidence. This pattern of resistance conflicts with the Superior Court's decision concerning pre-emption and activities arguably subject to Section 7 and 8 of the Act.

> Pre-emption is designed to shield the system from conflicting regulations of conduct. It is the conduct being regulated not the formal description of governing legal standards that is the proper focus of concern." *Motor Coach Employees v. Lockridge*, 403 U.S. 274.
>
> "When an activity is arguably subject to Section 7 or 8 of the Act, the States as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board," *Building Trades Council v. Garmon*, 359 U.S. 236.

2. The decision of the Third Circuit Court of Appeals below in the instant case and in *N.L.R.B. v. Swift & Co.*, 294 F.2d 285, upon the authority of which this instant case was decided, are in conflict with the decision of the Supreme Court decision in *I.L.G.W.U. v. N.L.R.B.*, 366 U.S. 731 (1961), and the Fifth Circuit Court of Appeals in *N.L.R.B. v. Signal Oil & Gas Co.*, 303 F.2d 785 (C.A. 5, 1962). The conflict is based on the burden of proof required to constitute substantial evidence. The Third Circuit in *N.L.R.B. v. Swift, supra*, allows a company to avoid its position of neutrality "in the absence of substantial evidence to support the finding that the employer had a reasonable basis for believing that the union no longer represented a majority of its employees." This allows the company to determine which union represents a majority on a showing of only a reasonable basis. This conflicts with the Supreme Court's decision in *I.L.G.W.U. v. N.L.R.B., supra*, and *N.L.R.B. v. Signal Oil & Gas Co., supra*. In both of these cases, the Courts make it clear that a company cannot bargain with a union unless there is a clear showing of majority representation. It then appears that the Third Circuit allows the determination of the Board to be reversed on a lesser burden of proof than do other Circuit Courts of Appeal.

3. The conflict between the Board and the Circuit Courts, between the Supreme Court and the Third Circuit and between the Circuit Courts themselves show a great need for a definitive ruling on the Midwest Piping Doctrine by the Court. The solution of this conflict is of paramount importance to the administration of a unified labor law. As it stands today, a litigant must be prepared to meet different standards set by the Board and the Circuit Courts of Appeal. This conflict is diametrically in opposition to the Supreme Court's ruling in *Garner v. Teamsters Union*, 346 U.S. 485, where it opposed "a multiplicity of tribunals and a diversity of procedures" in labor matters.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

/s/ Jacob Friedland
JACOB FRIEDLAND
Attorney for Petitioner

APPENDIX A

Decision and Order of N.L.R.B.

DECISION AND ORDER

On November 27, 1972, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, Respondents jointly filed exceptions and a supporting brief, and United Transportation Union, Lodge No. 1589, filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in the proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-examinations, and briefs, and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

---

1. The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct the Administrative Law Judge's inadvertent error in finding that Respondent H.A.M.L. violated Sec. 8(a)(3) of the Act by unlawfully recognizing, and signing a contract with, the United Transportation Union. Such conduct violates Sec. 8(a)(2) of the Act, and we so find.

Also, Respondent H.A.M.L. Corporation is to post Appendix B attached to the Administrative Law Judge's Decision, rather that Appendix A as the Administrative Law Judge inadvertently states in his recommended Order.

2. Inasmuch as we adopt the Administrative Law Judge's finding that Respondents Suburban and H.A.M.L. constitutes a single employer within the meaning of Sec. 2(2) of the Act, and since Suburban's operations clearly meet the Board's jurisdictional standards, we find it unnecessary to, and do not, pass upon the question whether the Board would assert jurisdiction over H.A.M.L.'s school bus operations, were those operations before us on an independent basis.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents, Suburban Transit Corp. and H.A.M.L. Corporation, New Brunswick, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order except that the attached notice is substituted for the Administrative Law Judge's Appendix A.

Dated, Washington, D.C. May 4, 1973.

JOHN H. FANNING,
Member

HOWARD JENKINS, JR.,
Member

JOHN A. PENELLO,
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board
An Agency of the United States Government

WE WILL NOT give effect to the collective-bargaining agreement entered into October 14, 1971, with UTU, or to any extension, renewal, or modification thereof, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among our employees.

WE WILL NOT recognize UTU as the exclusive representative of our employees for the purposes of collective bargaining unless and until it has been selected by them in the manner prescribed above.

WE WILL NOT discriminate against any employee by discharging or refusing to reinstate him because he has engaged in a strike or any other concerted activity.

WE WILL reinstate with backpay all employees discriminatorily discharged or refused reinstatement for striking.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by the National Labor Relations Act.

SUBURBAN TRANSIT CORP.
(Employer)

By
(Representative) (Title)

Dated

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-2100.

Irwin Kaplan, Esq., and *Stephen M. Koppekin, Esq.*, of Newark, N.J., for the General Counsel.

Warren W. Wilentz, Esq., and *Alfred J. Hill, Esq.*, of *Wilentz, Goldman & Spitzer*, Perth Amboy, N.J., for Suburban Transit and H.A.M.L. Corporation.

David Solomon, Esq., of Jersey City, N.J. for the Charging Party.

Robert M. Saltzstein, Esq., of *Mirkin, Barre & Saltzstein*, Great Neck, N.Y., for the United Transportation Union.

DECISION

Statement of the Case

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Newark, New Jersey, on various dates in February, April, and May, 1972, on a consolidated complaint issued December 29, 1971, based on charges filed October 29, November 8 and November 11, 1971 and amended December 7, 1971. The complaint alleges that Respondent Suburban violated Section 8(a)(1) and (2) by executing a new collective-bargaining agreement with the UTU while a question concerning representation, raised by a petition filed by the Teamsters, the Charging Party herein, was pending, violated Section 8(a)(1) and (3) by virtue of the fact that said contract contained a union-security provision, violated Section 8(a)(1) by threats to strikers, and violated Section 8(a)(3) and (1) by discharging strikers. The complaint alleges that Respondent H.A.M.L. violated Section 8(a)(2) and (1) by executing a contract with UTU at a time UTU did not represent an uncoerced majority of H.A.M.L.'s employees, and by assisting UTU in its organizing drive, violated Section 8(a)(3) and (1) by the existence of a union-security

provision in said contract, and violated Section 8(a)(1) by acts of surveillance and assistance.

Respondents deny that any unfair labor practices have been committed. UTU, the party to each of the contracts, denies all allegations of the complaint that impinge upon its contractual relationship with Suburban and H.A.M.L., specifically denying that UTU has been illegally assisted by the execution of either contract, that a question concerning representation existed at Suburban, and that H.A.M.L. unlawfully assisted UTU in organizing H.A.M.L.'s employees.[1] The General Counsel's affirmative case of a violation of Section 8(a)(2) by Suburban is essentially based on the *Mid-West Piping* doctrine.[2] As in this case the Teamsters filed a petition with the Board seeking to represent Suburban's employees on September 29, 1971, and on the same date employee Joseph Manga filed a decertification petition with the Board seeking to unseat the UTU, the execution of a new contract with UTU by Suburban on October 14, 1971, at a time when Suburban was fully aware of both the Teamsters' petition and the decertification petition, was in violation of Section 8(a)(2) and (1) of the Act.

Respondent Suburban, relying principally on the 3rd circuit's decision in *N.L.R.B. v. Swift and Company*, 294 F.2d 285, contends that UTU's convincing showing of

1. As the party to the contract in each case, UTU is of course a necessary party to the case. During the hearing, however, I limited its participation to those issues and allegations bearing upon its contractual relationship. I did not, for example, permit participation by UTU, by way of examination or cross-examination, on matters pertaining to the alleged discriminatory discharges by Suburban.

2. *Mid-West Piping and Supply Co., Inc.*, 63 N.L.R.B. 1060. This doctrine in general requires an employer to remain neutral when rival unions are claiming representation rights for his employees. As explained in subsequent cases, see, e.g., *Shea Chemical Corporation*, 121 N.L.R.B. 1027, upon presentation of a claim raising a real question of representation an employer may not bargain with even an incumbent union until the question concerning representation has been settled by the Board.

majority support following the filing of the petitions, by the signature of a large majority of employees on a petition to ratify the contract which had been negotiated, removed any doubts as to which union represented the employees, meant that there was no longer a real question concerning representation, and permitted the execution of the contract.

UTU argues that the Board should dismiss the 8(a)(2) allegation against Suburban and permit the contract between it and Suburban to stand, both on *Swift* grounds, and because of the allegedly duplicitous conduct by UTU's Chief Negotiator, Daniel Raya, who was in effect a Teamster agent, and whose actions following negotiation of the contract were designed to and did prevent it from being ratified, so that the Teamsters could file the petition they were not able to file during the insulated period.

The General Counsel counters this latter argument by contending that Rava's conduct was not shown to have prevented ratification, that even if it did, UTU can hardly be heard to complain about the conduct of its own representative, particularly when other UTU representatives, present at ratification meetings, not only did nothing about it, but did not indicate in any way that Rava was misrepresenting to the assembled employees. As to the *Swift* argument, the General Counsel relies principally, of course, on Board law as controlling, rather than a particular Court's contrary view (even though this case arises at the same circuit), and contends in essence that *Swift* would not apply in any event because the signatures of employees on the petition to ratify were tainted or coerced.

As to the 8(a)(1) and (3) violation with respect to Suburban, they are all, for practical purposes, dependent

on the violation of Section 8(a)(2). Thus, if the October 14th contract was legally executed, then the striking employees were in violation of the "no-strike" clause therein and could be discharged. And if the contrast was lawful, then the threats to the strikers were similarly lawful. Finally, of course, if the execution of the contract was lawful, so was its union-security provision.

With respect to H.A.M.L., the General Counsel urges that it negotiated and signed the contract with UTU to keep the Teamsters out, expecting that the Teamsters, which it knew was organizing its employees, would file a representation petition with the Board, and that the UTU did not have an uncoerced majority because of Company assistance to it in obtaining signatures. H.A.M.L. and UTU defend by denying that any of H.A.M.L.'s conduct constituted unlawful assistance, so that UTU did represent an uncoerced majority, by questioning the General Counsel's version of events, specifically claiming that General Counsel witness Bien should not be credited and by contending that Flanagan was not a supervisor, so that any conduct on his part is not attributable to H.A.M.L. H.A.M.L. also contends that the recognition of UTU was lawful for the above reasons, and because the Teamsters never notified H.A.M.L. of its interest until after the UTU contract was signed.

Counsel for the General Counsel and for the Respondents have filed briefs with me.

Upon the entire record, including my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondents

Respondent Suburban, a New Jersey corporation, with its principal office and place of business at 750 Somerset

Street, New Brunswick, New Jersey, is engaged in the transportation of passengers by bus. During the calendar year 1971, Suburban had gross revenues of more than $500,000, of which more than $50,000 was derived from interstate passenger service. I find, as Respondent Suburban admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent H.A.M.L., herein called HAML, also a New Jersey corporation, has its principal office and place of business at 333 Handy Street, New Brunswick, New Jersey, where it is engaged in providing school bus and charter service transportation. During the calendar year 1971, HAML had gross revenues in excess of $400,000. I find, accordingly, in accord with *Charleston* Transit Co., 123 N.L.R.B. 1296, that Respondent HAML is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[3]

II. The Labor Organizations Involved

Highway and Local Motor Freight Drivers, Local No. 701, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Charging Party herein, and United Transportation Union, Lodge No. 1589, AFL-CIO, the party to the contracts, herein called UTU, are admittedly labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Suburban—The Facts*

UTU has represented the employees of Suburban for approximately 30 years.[4] Its most recent contract prior

3. Respondent HAML denied the Board's jurisdiction in its answer to the complaint, but has apparently abandoned that position, as its brief does not refer to it.

4. UTU was formerly the Brotherhood of Railroad Trainmen, Lodge No. 993. It became UTU some time between 1968 and 1970.

to the one at issue in this case was executed September 15, 1968, to run until September 14, 1971. UTU requested bargaining for a new contract in July 1971. Following some preliminary meetings, real negotiations began about the end of August 1971. At about that time Daniel Rava, a Suburban employee, became chairman of the UTU Grievance Committee, which served, in effect, as the bargaining agent for that union. A number of negotiating sessions were held between them and the expiration date of the contract. On September 14, a "package," arrived at the day before, was presented at a membership meeting. The membership rejected the package by a 49 to 3 secret ballot vote. (There were 66 employees in the bargaining unit at that time.)[5] Another negotiating session was held on September 24, at which Suburban increased its wage offer.[6] This new package was presented to a membership meeting that same day. No vote was taken at that meeting, where "people were very boisterous and we almost had a couple of fist fights in there."[7] General Counsel witness Manga credibly testified that the meeting was "chaotic," that it "didn't seem like anybody like it [the package being presented] at all." Gerard McPhillips, a UTU official,[8] also testified to the "chaos" at that meeting. He testified that there were about 20 to 25 people at the meeting (other estimates varied, but were generally about 30), and that

5. The role played by Rava in presenting the package to the membership at this and a subsequent meeting is at issue here, and is discussed below.

6. The September 14 package included a wage offer of an 80-cent increase the first year, 40 cents the second, and 20 cents the third. The September 24 offer was 80 cents the first year, 40 cents the second, 30 cents the first 6 months of the third year, and 30 cents the second 6 months of the third year.

7. Testimony of Richard L. Peterson, Jr., a UTU witness, and vice president of the UTU's Committee on Adjustment (apparently the same as the Committee on Grievances, of which Rava was chairman).

8. He was on part-time assignment as an international representative, and assisted the local in handling negotiations. McPhillips was present at the ratification sessions.

about 10 to 15 members seemed determined not to accept any contract with a three-year term.

Shortly after that ratification meeting, on September 27 and 28, employee Joseph Manga circulated a petition to decertify the UTU, obtaining the signatures of more than 30 percent of the employees thereon, and also solicited employee signatures on Teamster authorization cards. The petition and the cards had been given to Manga by Rava. Manga filed the decertification petition on September 29, and the Teamsters filed a representation petition the same day.

On September 28, a meeting was held between Suburban officials and the UTU, with a Federal mediator present. All present apparently agreed that it would be useless to hold another membership meeting for ratification, but instead they discussed whether to poll the employees by mail or circulate a petition. Although that meeting ended with a decision to use a mail ballot, a position Rava had espoused at the meeting, that evening, as a result of some discussion between UTU International Representative Moore and Local President Zechman, Peterson and Zechman decided to circulate a petition, believing, according to their testimony, that Rava was collaborating with the Teamsters and had advocated the mail ballot in order further to delay matters. Such a petition was prepared, and circulated by Peterson and another UTU official, Alexander. Morris Lipschitz, the principal owner of Suburban, told Rava that he should work with Peterson and Zechman to get the petition signed, and if 80 or 90 percent of the employees signed it "this would knock the Teamster petition right out of the box," and that if Rava did help he "would be in with the company one thousand percent."[9]

9. Lipschitz did not testify.

On October 1, the petition was circulated, and 51 of the 66 employees signed it. Peterson testified that he told a number of the employees to whom he circulated the petition that they might lose their benefits if the union did not sign the contract. Peterson also testified that he explained to a number of the employees that if the Teamsters became their bargaining agent, negotiations would have to start over completely, and that he was against the Teamsters coming in on the property. The petition was presented to the company; company official Sidney Kuchin checked the signatures on it against the payroll, and President Lipschitz agreed to sign the contract when he returned from a trip to California. On October 14, the contract was executed.

On October 26, at a meeting at the Teamsters' hall, the employees of Suburban voted to strike.

The next day a number of Suburban employees went out on strike and began picketing the company's premises, with signs reading "EMPLOYEES OF SUBURBAN TRANSIT ON STRIKE UNFAIR LABOR PRACTICES LOCAL TEAMSTERS UNION NO. 701." The number of employees who picketed is disputed, estimates ranging from 25-30 to 40-46. It is clear that only 8 employees reported to work during the strike, but it is not clear that the remaining employees all supported the strike; some may have refrained from working because of harassment by pickets. On October 29, Suburban wrote to each striking employee that he would be suspended if he did not report back to work on November 2. On November 1, Suburban obtained a temporary restraining order from the Superior Court of New Jersey. Nineteen of the strikers did not report for work on November 2. On November 5, 18 of these 19 unconditionally applied for reinstatement. Following hearings conducted by Suburban, all but two of these 18 were discharged.

B. *Suburban—Discussion*
1. The 8(a)(1)

The General Counsel is correct that the bare-boned facts fall squarely within the Board's Midwest Piping doctrine, for Suburban entered into the new contract with UTU after, and with knowledge of, the representation petition filed by the Teamsters and the decertification petition filed by Joseph Manga. Furthermore, both these petitions raised questions concerning representation in that they were supported by cards (the Teamster petition) and a petition (the decertification petition) containing the signatures of at least 30 percent of the employees of Suburban, they were clearly for an "appropriate unit" (the very unit for which UTU was the incumbent representative), and there was no extent contract at the time of their filing to bar an election. These facts alone clearly establish a *prima facie* case of a violation of Section 8(a)(2) and (1) by Suburban.

I cannot, of course, accept Suburban's and UTU's argument that no violation be found because of the *Swift* case, *supra*, even though this case arises within the Third Circuit, for (saving for the moment the other defenses urged by Suburban and UTU) and I am constrained to follow Board law, even where a Court of Appeals has disagreed. Although there are distinctions between this case and *Swift*, e.g., in *Swift* the particular unit for which a petition had been filed by an outside union was "covered" by a master contract, embracing many units, which specifically provided that its terms would become inapplicable to that particular plant if the outside union prevailed in the election, the basis reasoning of the Court would apply here. With all due respect, I believe that reasoning is fallacious, completely missing the point of the Board's doctrine. The Court rejected the Board's

finding of a violation essentially on the ground that the mere filing of a petition does not establish that a real question concerning representation exists. As only a hearing had been held on the petition, with no election directed, and because the administrative showing of a 30 percent interest by the petition, although sufficient for representation cases, was not a sufficient evidentiary basis for an unfair labor practice finding, nor could it support the Board's finding that the employer had a reasonable basis for believing that the incumbent no longer represented a majority, the Court denied enforcement of the Board's order.

Implicit in the Court's holding was that it would have sustained the Board had an election already been directed. Under the Court's view, therefore, a company preferring to deal with one union could with impunity contract with that union even though a petition by a rival had been filed if it hastened to do so before the Board issued its direction. Adoption of the view that the direction of election is the turning point beyond which the employer is required to be neutral would thus nullify, for practical purposes, the entire *Midwest Piping* doctrine.

To the extent that the Court held that there was no evidence to show that the employer had a reasonable basis for doubting the incumbent's majority, the Court, in my opinion, again misconstrued the Board's doctrines. Whether a "real question of representation" exists does not in any way turn on whether the company has a "reasonable doubt." Once a petition has been filed seeking to unseat an incumbent union, provided that the petition is for an appropriate unit, there is no contract bar, and there is a 30 percent administrative showing of interest, the Board will direct an election without regard for the fact that the employer may have no doubt that

the incumbent represents a majority. Indeed, once it is recognized, as the Court apparently has, that an election can be conducted without permitting litigation of whether the petitioning union had an adequate showing of interest, it follows that no such litigation should be permitted in a complaint proceeding, for the latter turns on whether there was a question of representation, a representation case concept. When, of course, the Board has not yet directed an election, the complaint proceeding does provide a forum for litigating whether there was a question of representation, but only in the same manner as that question would have been "litigated" in a representation proceeding. *William Penn Broadcasting Corp.*, 93 N.L.R.B. 1104.

Apparently the Court would not have reversed the Board had an election been directed, for it cites with approval *St. Louis Independent Packing Company v. N.L.R.B.*, 291 F.2d 700 (C.A. 7). But the actual direction of election no more suggests the incumbent union's lack of a majority than does the filing of the petition. And if no "reasonable doubt" is essential to finding a violation after a direction of election, it is difficult to see any logic in requiring such a reasonable doubt before finding a violation based on the filing of the petition.

As noted, it is incumbent upon me to decide, in this complaint proceeding, whether a real question concerning representation existed, a question I reach in connection with Respondent's and UTU's other defenses, before a *Midwest Piping* issue can be resolved. The point, of course, is that once such a petition had been filed, it is for the Board to determine whether there is a question concerning representation, and to resolve such a question by a Board-conducted election; it is not for the employer to do so. Granted, an employer may recognize one of

two competing unions and yet not be guilty of a violation if it eventuates that no question concerning representation existed, but he does so *at his peril.*

Both Suburban and UTU contend that the ratification petition demonstrated UTU's majority, so that Suburban could legally execute the contract, there is no longer being any doubt, or question, who represented the employees. A question of representation is not, as shown above, resolved by one of the two competing unions attaining a majority other than in a Board election. Furthermore, in this instance, even a desire on the part of the employees to have the contract executed does not signify that a majority of the employees wanted UTU to continue to represent them. These same employees had refused to ratify the agreement earlier; many of them had signed Teamsters' cards, or the decertification petition; and many subsequently went out of a Teamster sponsored strike. Thus, the ratification petition was not only not a substitute for the secret ballot of a Board-conducted election, the entire circumstances here indicate the wisdom of the Board's *Midwest Piping* principle, of not permitting an employer to resolve the question based on the presumed employee sentiment at a given moment of time. In short, even assuming that a majority of the employees uncoercedly[10] indicated a desire for UTU representation by

10. The General Counsel contends that the signatures were "coerced" because Peterson told a number of employees they would lose benefits unless they signed the petition, and because Morris Lipschitz told Rava that he would be in with the Company 1000 percent if he assisted in obtaining the signatures on the petition. I accept Peterson's explanation that he "meant" that delay in executing the contract might result in a loss of benefits because of a governmental freeze, and do not regard his statements as coercive, particularly since it was true that the benefits of the new contract would be lost, at least temporarily, if it were not executed. As to the statement to Rava, since Rava obviously did not go along with Lipschitz, it could not have affected the signing of the petition. Lipschitz' statement does show the strong desire of Suburban to conclude the contract with UTU and keep the Teamsters out.

signing the ratification petition, that would not legitimatize Suburban's recognition of UTU.

The final defense of Suburban and UTU raises novel and interesting questions. Stemming from the admitted fact that Daniel Rava, chief negotiator for the UTU, was at the same time organizing Suburban's employees for the Teamsters,[11] and the contention that he was an agent of the Teamsters for the purpose of seeing to it that Suburban and UTU did *not* execute a contract before the Teamsters could file a petition,[12] Suburban and UTU make three contentions. First, they argue that but for Rava's conduct designed to prevent, and preventing the execution of the contract during the insulated period, the contract would have been executed. Accordingly, the Board should deem the contract to have been executed, a bar to the Teamsters' petition, and therefore no question concerning representation existed. Second, they argue that the Teamsters' petition should be dismissed because the Teamsters did not have "clean hands," having used Rava's services when Rava was UTU's chief negotiator. Finally, they urge that Rava's duplicity, in the context of UTU being the incumbent union and the employees' choice of UTU being reaffirmed by the signatures on the ratification petition, make application of *Midwest Piping* here particularly inappropriate, that the Board should as a matter of policy refrain from applying it to the instant situation.

The facts relied upon by Respondent and UTU to support the aforesaid contentions mainly concern the acti-

11. Rava obtained cards from the Teamsters, and then gave them to Magna, who did the actual organizational work of obtaining signatures.

12. Under Board law, the 60-day period prior to the expiration date of a contract is an "insulated" period, meaning that the Board will not entertain a petition for an election by an outside union seeking to unseat an incumbent union during that period. Thus, only if no contract is executed during the 60 days can a rival union file a petition for an election thereafter.

vities and conduct of Daniel Rava. Rava first contacted the Teamsters some time in July. In early September, he called Teamster representative Martin McDermott to see if the Teamsters was interested in representing Suburban's employees. Rava, along with Suburban employee Joseph Manga, met with McDermott shortly thereafter. McDermott told Rava that the Teamsters could not help at that point because there could not be an election until the contract expired, and also that he would check with the International to see if there was some sort of no-raid agreement. On September 15, the day after the membership meeting of UTU rejected the "package" by 49 to 3 vote, Rava went to the Teamsters hall with Peterson and obtained from McDermott both Teamsters authorization cards, and a decertification petition. Peterson at that time told Rava that he was making a mistake, that it was not a wise thing to do. Peterson shortly thereafter told UTU representative McPhillips about this incident, and McPhillips in turn informed UTU international official Kenneth Moore about it. After the September 24 meeting, which broke up in "chaos," Rava gave the cards and the decertification petition to Manga, who solicited employees' signatures on them. The testimony and exhibits show that Rava was reimbursed by the Teamsters for telephone calls and gasoline to the extent of about $150. Some other employees of Suburban had telephone bills and gasoline expenses paid, and Bien received a loan of $400, which he later repaid. (The loan was arranged after Bien's termination from Suburban on November 16.) Rava was elected Chairman of UTU's negotiating committee late in August, so much of the conduct described above occurred while he was in that office, and he took that office after he had first become interested in obtaining Teamster representation for Suburban's employees.

These activities by Rava form part of the basis for Respondent's and UTU's defense. In addition, they contend that Rava's presentation of the "packages" at the meetings was designed to prevent ratification. The testimony shows that at the September 14 meeting, Rava did not read the entire contract, which contained more than 20 double-spaced pages, as finally executed (and apparently at that time also), but only the "highlights," and made no recommendations. The vote, as noted above, was 49 to 3 against ratification. McPhillips testified that he took no position with respect to Rava's presentation, because he could sense the men did not want the package.

On September 24, at the second ratification meeting,[13] Rava again read the highlights of the package. Although he testified that he recommended the package, I believe that he was mistaken, as both Manga and Kunz testified to the contrary. The meeting broke up in chaos, as noted above. At a discussion subsequent to the meeting among McPhillips, Peterson and Rava, it was mutually agreed that there had not been a fair opportunity to present the package. McPhillips testified that he "tried to encourage him [Rava] not to be, you know, upset by these things . . . ." At a subsequent meeting with Suburban officials, it was decided that another membership meeting would be pointless. A State mediator suggested that a petition be circulated among the men. Rava suggested a mail ballot, opposing a petition, and it was decided to take a mail ballot. Subsequently, McPhillips and Zechman decided to circulate a petition.

On the above facts, I do not consider that Rava was charged by the Teamsters with ensuring that a contract

13. McPhillips estimated there were about 20 to 25 present, Rava and employee Castiglione about 30, and Manga about 50.

between UTU and Suburban not be executed so that the Teamsters could file a valid petition. The testimony of both Rava and McDermott shows that Rava sought and received information from McDermott, not a mandate from him to prevent a contract from being concluded and executed. It may well be that Rava himself, obviously desirous of changing the employees' representative from UTU to Teamsters, and knowing that could be possible only if no contract was executed by September 14, was not unhappy with the results of the September 14 and 24 meetings. But the testimony of Rava as to what he told the employees at the ratification meetings on those days was substantially confirmed by General Counsel witnesses and was not seriously contradicted by Suburban or UTU witnesses.

Although Rava did not affirmatively recommend the "packages" reached in bargaining between Suburban and UTU, his presentation does not appear to have been unfair. The very fact that the company upped its "ante" after the first two rejections, indeed, demonstrates that the failures to ratify were eminently wise and successful from the employees' standpoint. Further confirmation of the fact that Rava's presentation was not unfair lies in the failure of other UTU officials and representatives present either to supplement Rava's presentations, object to it, or in any other way to indicate dissatisfaction.[14] In short, whatever Rava's subjective desire may have been, the performance of his official duties as chief negotiator was carried out with no overt reflection of any sinister purpose.

14. Indeed, Zechman and McPhillips knew about Rava's liaison with the Teamsters shortly after the September 14 meeting, and of course before the September 24 meeting, but said nothing to the members even at the latter meeting about Rava's presentation.

By the same token, I reject UTU's contention that no question concerning representation existed because the contract should and would have been executed prior to the filing of the petition. As the evidence does not support the contention that Rava misconducted himself in the negotiations or in presenting the results of the negotiations to the employees, there is no warrant for concluding that the contract would have been executed. Whether this claimed defense would be legally tenable if the facts showed that Rava deliberately prevented ratification of the contract is an interesting question. From Suburbans' standpoint, it would seem to make no difference, for Suburban's execution of the contract on October 14 was with knowledge of the Teamsters' petition, and without any claimed knowledge, or even suspicion, of any misconduct on Rava's part in his presentation to the employees. From UTU's standpoint, this defense, were it factually supported, would have somewhat more to commend it on equitable grounds, although it might be argued that the UTU should control its own officials, and cannot rely on misconduct by one of them to save it from attack by an outside union. From the employee's standpoint, however, if the contract would have been executed, no Teamster petition could have been filed, and the equities would appear to favor regarding as done what should have been done. I suggest these possibilities for further consideration by the Board in the event the Board should disagree with my conclusion that Rava's conduct at the ratification meetings was not designed to prevent the execution of the contract so that the Teamsters could file its petition.

With regard to Rava's "duplicity" in seeking to have the Teamsters supplant UTU while at the same time continuing to function as UTU's chief negotiator, I do not regard

this as having any legal significance. Had Rava, in playing a dual role, demonstrably permitted his Teamsters activities to affect his UTU functions, a different question, as discussed above, would be presented. But as matters stand, the lack of such showing means that the "duplicity,"[15] did not cause the failure of Suburban and UTU to execute a contract prior to the filing of the Aeamsters' petition.

A final contention concerns the Teamsters' use of Rava, knowing him to be a UTU official, and, therefore, allegedly lacking "clean hands." Had the Teamsters come to Rava, I would look at the situation with a much more jaudiced eye, but I do not regard their acceptance of his proffered services as so reprehensible as to disqualify the Teamsters from filing their petition, or of such a nature as to cause the Board to reject it.

In all the circumstances, and for the reasons stated, I conclude that Suburban violated Section 8(a)(2) and (1) of the Act by executing the contract with UTU while a real question concerning representation was pending before the Board.

2. The 8(a)(1) and (3) - Suburban

Having found that the contract between UTU and Suburban of October 14, 1971 was unlawfully executed, it follows that the strikers were at the very least engaged in a protected concerted activity and could not be discharged for striking or refused reinstatement upon request. This would be equally true whether the strikers were protesting the discharges of two Suburban drivers, Comrie and Hink, or were protesting the contract's execution, in which latter

15. I express no opinion on the ethics of Rava's seeking Teamster representation while remaining the UTU's chief negotiator.

case they would be unfair labor strikers, rather than economic strikers.[16]

Respondent Suburban also argues that the strike "was unlawful, as shown by the Temporary Restraining Order entered November 1, 1971 in the State Court." I am not sure whether Respondent is saying that this injunction made the strike unlawful even if the contract was invalid, or that the injunction demonstrates the legality of the contract, and hence the "unlawful" or "unprotected" nature of the strike. In any event, neither contention is meritorious. Clearly, a decision on a TRO does not preempt the Board from deciding the unfair labor practice issue now presented to it. Nor does disobedience of the Court's order, whatever effect it might have in terms of possible contempt of court to those who continued to strike, make unlawful - *vis-a-vis* Board law, otherwise lawful or protected conduct.

I have assumed, as the parties all appeared to do at the hearing, that if the October 14 contract was lawfully executed, the 8(a)(3) allegations of the complaint would fail. Although I do not reach the question, and perhaps could not in view of the way the matter was litigated, I am not certain that the "no-strike" clause in that contract was applicable to the instant situation. For the clause, found in Article 13 of the contract, entitled "Discipline and Investigation," providing generally for grievance

16. Although some of the employees who attended the meeting of the Teamsters at which it was decided to strike testified that the discharges were not discussed there to their recollection, both Rava and McDermott testified that there were discussions about the discharges, but that the bulk of the discussion concerned the signing of the contract of October 14. McDermott sent a telegram to Suburban on October 27 advising the company that the Teamsters considered the discharges an unfair labor practice, and also that they considered the action taken against the strikers an unfair labor practice. On all the testimony, I concluded that the strike was caused both by the discharges of Comrie and Hink and by the execution of the contract. It was, accordingly, an unfair labor practice strike, as one of its causative factors has been found to be an unfair labor practice.

and arbitration, provides "Recourse to outside tribunals will not be made by either party until the [Union] has been advised and given a reasonable opportunity to intervene and dispose of or adjust the situation as the case may be. This, with the understanding that there shall be no authorized strike during such period the dispute is pending under the discussion with either the local lodge or the Grand Lodge." As the strike was to protest, at least in part, the execution of the contract with the UTU, it may well not represent the kind of "grievance" that could be resolved by the grievance and arbitration provisions of the contract, for UTU could hardly be expected to represent the employees who struck against it. See *Kansas Meat Packers*, 198 NLRB No. 2. Arguably, therefore, the limited kind of no-strike provision would not apply here. As I said, however, I need not resolve this problem.

C. H.A.M.L. - The Alleged 8(a)(2) and (1)

Starting at the end of the story in this case is more illuminating than starting at the more usual beginning. I refer to the rather remarkable events on the night of November 3, 1971.

The scenario of that night, almost without more, indicates that HAML was exerting every effort to keep Teamsters from becoming the employees' bargaining representative. The night's events culminated a feverish day of activity—all the events of the HAML case taking place on the day and night of November 3 and the very early morning hours of November 4. Austin Zechman, president of UTU, called Sidney Kuchin, HAML vice president, late in the afternoon of November 3, and requested recognition for the UTU. About 6 P.M., Kuchin called Pat Kilcoyne, HAML operations manager, to be available. About

7:30 that evening Kuchin called Ronnie Kohn's home, where a birthday party for Kohn (Suburban's operations manager) was in progress, with Kilcoyne and his wife, among others, there as guests. Mr. and Mrs. Kilcoyne and Kohn then left the party and went to Suburban's office. Zechman, Kuchin, and Lee Jacobs, president of HAML, were awaiting them there, as were Bascocky, Lobmayer and Fayda, the new UTU bargaining committee which had been appointed by Zechman. Bascocky was drafted for the new committee by Zechman, even though he had, as Zechman knew, signed a Teamster card earlier that day. The parties "negotiated" from about 8 P.M. to about 1:30 A.M. the next morning. Zechman had told everyone present that "it was important to get the contract signed, negotiated and signed so we could get it in before the Teamsters, certainly."[17]

The parties used the October 14 Suburban-UTU contract as a model or guide. As each portion of the contract was agreed upon, Mrs. Kilcoyne typed that part. Finally, at the conclusion of the session approximately 2 A.M., the contract was signed by HAML officials, and then taken to a motel, where Kenneth Moore, vice president of UTU was staying, to be executed for the UTU.

About 7:30 A.M. on November 3, the day's events began. At that time, Kilcoyne, HAML's operations manager, called Bien, Suburban's chief dispatcher, and told Bien that Local 701 (the Teamsters) was organizing HAML's employees. Zechman was standing next to Bien at the time.[18] (The Teamsters had in fact begun to organize

17. Zechman's testimony, on cross-examination. He subsequently stated that the Teamsters was not mentioned at all during that meeting. He was either confused the second time or else was differentiating between "during" and "at the beginning" of the meeting.

18. I credit Bien's testimony in this respect and in other respects where contradicted by Zechman. I also credit his testimony concerning Kilcoyne's call. Kilcoyne did not deny the call; he testified that he told Bien that he heard "rumors . . . that the Teamsters had their eye on HAML."

at HAML that morning, employee Wayne Langdon having obtained authorization cards from McDermott the preceding day.) Bien told Zechman what was being said, and Zechman responded that "we'll have to go down there and organize them." At about 11:30 that morning, Bien called Flanagan, HAML's dispatcher, to ask Flanagan what drivers he could give Bien for New York runs that night. Flanagan replied "I am going to have to cut you a couple short. We are down here getting people signing cards." Flanagan also mentioned that Alexander and Zechman were down there, and that Lobmayer was going to help them.[19]

A number of employees, Bascocky, Schuster, Coudray, Schorr, and Langdon, testified that when they came back to the HAML garage following their runs in the afternoon, they were solicited to sign UTU authorization cards.[20] Each of these employees had earlier that day signed a Teamsters card. Doing the soliciting were Alexander, Lobmayer, and Thomas. Lobmayer had himself signed a Teamsters card that morning. Lobmayer also testified that "about a half a dozen or so" of the employees he solicited for UTU authorization cards told him they had already signed Teamsters cards. According to Schorr, Flanagan told him to go see someone in the drivers room. Schorr and Schuster both testified that they were told by Lobmayer that the authorization paper was "just" for an election.[21]

19. Flanagan contradicted himself a number of times on the stand and was evasive in his responses. Although he first denied knowing what union was involved, saying only that he heard rumors some union was signing up the drivers, he later told Schuster "Go see your chairman, Mr. Lobmayer," and when asked if he knew what union was involved replied, "Well, I have to say yet because he had a paper in front of him and it said something about the U.T.U." I do not credit his testimony where in conflict with Bien's.

20. The "cards" were zeroxed authorizations, which had earlier been dictated and prepared by Zechman, on Suburban equipment.

21. Lobmayer denied having said this. I credit Schorr and Schuster.

When Lobmayer and the other UTU organizers determined they had a majority of employees signed up for the UTU, they notified Zechman, who in turn called Sidney Kuchin. The events of that evening, related above, then occurred. The next morning, Flanagan asked Kilcoyne how everything went in regard to the contract, and Kilcoyne replied "All signed, sealed and delivered."

This not a straight *Midwest Piping* case, for the contract was executed before the Teamsters petition was filed, without any claim to represent the employees having been made by the Teamsters. But the law does not permit an employer, in circumstances such as these, to recognize one of two competing unions when the recognition is designed to keep the other union from obtaining representation rights. UTU's role in the affair was not, of course, illegal. As Zechman said, UTU wanted a contract signed as quickly as possible for the express purpose of keeping the Teamsters from filing a petition. If UTU had won a legitimate race to achieve a majority among HAML's employees, with the Teamsters never getting off the ground, then the race would really be to the swift (no pun intended). But the blatant haste by HAML in cooperating with UTU's efforts to freeze out the Teamsters is just the kind of assistance the law prohibits. HAML officials suggested that UTU counter the Teamsters efforts, and, although the evidence of direct assistance in obtoning signatures on the mimeographed UTU "authorizations" is not particularly strong, gave at least tacit approval to and benevolent observation of, the UTU organizers at HAML's garage.

Significantly, Louis Lobmayer, who was instrumental, along with Alexander and Zechman, in obtaining the signatures on the UTU's "cards," himself had earlier that same day signed a Teamsters authorization card, and

testified that "about a half a dozen or so" of the card signers for UTU had told him they had signed Teamsters cards. Furthermore, four other employees who signed UTU cards testified to having signed Teamsters cards earlier.[22] The next day (the same "day" that the contract with UTU was executed) the Teamsters filed a petition with the Board.

As the Court of Appeals for the First Circuit pointed out in *N.L.R.B. v. Hunter Outdoor Products*, 440 F.2d 876, 880: "Particularly where an employer is aware of organizing efforts by a rival union, it acts at its peril in according hasty recognition when, one union claims majority support . . . . The most prudent course . . . would have ben to petition the Board for a Board-conducted election pursuant to Section 9(c) of the Act." The Court went on to say "The line between 'close cooperation' and 'interference with the freedom of choice of the employees' is a delicate one and often difficult to maintain, particularly when rival unions are involved."

The instant case is a particularly appropriate one for application of these principles. UTU, which did not appear on the scene at HAML until after the Teamsters began soliciting the employees signatures on their authorization cards (viz., Lobmayer's having signed a Teamsters card, and then assisting the UTU to obtain signatures on its hastily zeroxed "authorizations"). UTU official Zechman, a Suburban employee, was with chief dispatcher Bien at Suburban when Kilcoyne, HAML operations manager called Bien to tell him that the Teamsters were organizing. When the drivers came in to the HAML facility, they were directed by chief dispatcher

22. It is possible, of course, that some of Lobmayer's unidentified six were the same as some of the other four.

Flanagan to the UTU representatives, who used a seniority roster to check off those who signed UTU forms. Whether or not Flanagan was actually a supervisor,[23] there is no question, in my opinion, but that he was acting as an agent for HAML in so directing the employees. Indeed, when Flanagan was asked by Bien to furnish some drivers for Suburban, Flanagan said he could not do so, that "I am going to have to cut you a couple short. We are down here getting people signing cards."

The fact that UTU in these circumstances obtained a majority of signatures, some of which the record shows were of employees who had already signed Teamsters cards, is insufficient to justify the quick recognition, and hasty signing of a bargaining agreement almost identical, except in respects where the different nature of HAML's operation required changes, to that signed October 14 at Suburban. The transactions at HAML must also be viewed in the context of Suburban's unlawful recognition of UTU there, since the two companies constitute a single employer,[24] and since many of the same officials who

23. I find that he was, having authority responsibility to direct employees, such as assigning overtime, being called by employees who are unable to work for some reasons, and determining whether to send drivers to Suburban from HAML when requested by Suburban dispatchers or officials as noted below. Furthermore, Kilcoyne specifically told Flanagan to keep out of any union business, plainly regarding Flanagan as "management." There would be only one supervisor, Kilcoyne, for about 55 drivers, if Flanagan were not a supervisor.

24. Suburban and HAML are both located in New Brunswick, New Jersey, about a mile apart, and both are in the bus transportation business. The president of HAML, Lee Jacobs, is vice president of Suburban; Sidney Kuchin is vice president and secretary of HAML and secretary of Suburban. Virtually all the stock of Suburban is owned by Morris Lipschitz, who is president of Suburban. The HAML stock is owned in equal parts by Morris Lipschitz' son, Herman, and Lee Jacobs and Sidney Kuchin, both sons-in-law of Morris Lipschitz. Kuchin is the manager of Suburban, but he and Lee Jacobs negotiated the contract with HAML. It is clear that the two companies are closely related, perform similar functions, interchange employees and equipment on many occasions, and that the labor relations of both are in large measure in the hands of Lee Jacobs and Sidney Kuchin. For these reasons, I conclude that they constitute a single employer within the meaning of Section 2(2) of the Act.

participated in the first violation also participated in the second. The contract between UTU and HAML was indeed negotiated at Suburban. As I have earlier found, it was evident where the preference of both companies lay, they wanted to keep UTU in, and by so doing to keep the Teamsters out. I conclude, for all the foregoing reasons, that HAML violated Section 8(a)(3) and (1) of the Act by recognizing, and signing a contract with UTU on November 3 and 4, 1971. As this contract contained a union security provision, Respondent HAML also violated Section 8(a)(1) and (3) by its execution.

The complaint alleges that HAML independently violated Section 8(a)(1) of the Act by Flanagan asking employee William Coudray to spy at a Teamsters meeting on November 5, and to call Pat Kilcoyne and inform Kilcoyne what had taken place at that meeting. Flanagan denied that he told Coudray to attend the meeting or to call Kilcoyne and tell him what had occurred. However, Kilcoyne testified that Coudray did in fact call him and tell him about the meeting, although he (Kilcoyne) told Coudray that the information was unsolicited, that he really wasn't interested, and that he had given instructions to Flanagan not to get involved with the union business, just to stay out of it and do his own job. I cannot conceive of Coudray at that time attempting to build up a case against HAML by calling Kilcoyne, as he did, and manufacturing a story about Flanagan having told him to call. I must conclude, accordingly, that Flanagan did so tell him. Therefore, as I have found that Flanagan was a supervisor, this conduct is attributable to HAML even though Flanagan was instructed to stay out of the union business, and HAML accordingly violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondents Suburban and H.A.M.L. are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Suburban and H.A.M.L. constitute a single employer within the meaning of Section 2(2) of the Act.

2. UTU and Local 701, Teamsters, are labor organizations within the meaning of Section 2(5) of the Act.

3. By entering into a collective-bargaining contract with UTU, containing a union-security provision, on October 14, 1971, Respondent Suburban has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2) and (3) of the Act.

4. By discharging or refusing to reinstate on November 5, 1971, employees who struck on October 27, 1971, Respondent Suburban has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By entering into a collective-bargaining contract with UTU, containing a union-security provision, on November 4, 1971, Respondent H.A.M.L. has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2) and (3) of the Act.

6. By requiring an employee to keep under surveillance the union activities of other employees, Respondent H.A.M.L. has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The Remedy

It having been found that Respondents unlawfully assisted UTU by entering into contracts with that union at Suburban and H.A.M.L., respectively, I shall recommend that they cease and desist from such conduct and

from giving effect to the contracts which have been executed or to any extension, modification, or renewal thereof, with the understanding that nothing in my recommended Order shall be construed as requiring or permitting the varying or abandoning of wages, hours, seniority, or other substantial provisions contained in the contracts.

It having been found that Respondent Suburban discriminatorily discharged or refused to reinstate the employees listed in Appendix C attached hereto, I shall recommend that it reinstate them with backpay computed under the formulae of *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 719, and that it cease and desist from violating the Act in this manner.

It having been found that Respondent H.A.M.L. unlawfully requested an employee to engage in surveillance, I shall recommend that it cease and desist from violating the Act in this manner.

I shall also recommend that Respondents post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[25]

ORDER

A. Respondent Suburban, its officers, agents, successors, and assigns, shall:

25. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Recognizing or contracting with United Transportation Union, Lodge No. 1589, as the exclusive representative of its employees for the purposes of collective bargaining, unless and until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among Respondent's employees.

(b) Giving effect to its contract dated October 14, 1971 with UTU, or to any extension, renewal, or modification thereof, until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among Respondent's employees.

(c) Discriminating against its employees by discharging them, or refusing to reinstate them, for engaging in a strike.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold any recognition it has granted to UTU, unless and until the said labor organization has been certified in the manner aforesaid by the National Labor Relations Board.

(b) Offer immediate and full reinstatement to the employees listed in Appendix C of this Decision to their former jobs, or, if such jobs no longer exist, to a substantially equivalent job, without prejudice to their seniority or other rights and privileges, and make them whole for any loss

of pay suffered by reason of their discharges or refusals of reinstatement, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Notify immediately the above individuals, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at its facility at New Brunswick, New Jersey, copies of the attached notice marked "Appendix A."[26] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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26. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Notify the Regional Director for Region 22, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[27]

B. Respondent H.A.M.L., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing or contracting with United Transportation Union, Lodge No. 1589, as the exclusive representative of its employees for the purposes of collective bargaining, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among Respondent's employees.

(b) Giving effect to its contract executed November 4, 1971, with UTU, or to any extension, renewal, or modification thereof, until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among Respondent's employees.

(c) Requesting any employee to keep up under surveillance the union activities of other employees.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold any recognition it has granted to UTU, unless and until the said labor organiza-

27. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

tion has been certified in the manner aforesaid by the National Labor Relations Board.

(b) Post at its facility in New Brunswick, New Jersey, at places where notices to employees are customarily posted, copies of the notice attached hereto marked "Appendix A."[28] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.[29]

Dated at Washington, D.C.

/s/ Melvin J. Welles
MELVIN J. WELLES
Administrative Law Judge

28. See footnote .
29. See footnote .

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT give effect to the collective bargaining agreement entered into October 14, 1971, with UTU, or to any extension, renewal, or modification thereof, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among our employees.

WE WILL NOT recognize UTU as the exclusive representative of our employees for the purposes of collective bargaining unless and until it has been selected by them in the manner prescribed above.

WE WILL NOT discriminate against any employee by discharging or refusing to reinstate him because he has engaged in a strike or any other concerted activity.

WE WILL reinstate with backpay all employees discriminatorily discharged or refused reinstatement for striking.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by the National Labor Relations Act.

SUBURBAN TRANSIT CORP.
(Employer)

By
(Representative) (Title)

Dated

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building—16th Floor, 970 Broad Street, Newark, N.J. 07102. Telephone (201) 645-2100.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT give effect to the collective bargaining agreement entered into November 4, 1971, with UTU, or to any extension, renewal, or modification thereof, unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to the Board-conducted election among our employees.

WE WILL NOT recognize UTU as the exclusive representative of our employees for the purposes of collective bargaining unless and until it has been selected by them in the manner prescribed above.

WE WILL NOT request any employee to spy on the union activities of other employees.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by the National Labor Relations Act.

H.A.M.L. CORPORATION
(Employer)

By
(Representative) (Title)

Dated

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building—16th Floor, 970 Broad Street, Newark, N.J. 07102, Telephone (201) 645-2100.

APPENDIX C

Joseph L. Alfonso
Joseph Peter Castiglione
James Diorio
John Freitas
Rudy Hamblin
John Kunz
George Laverdiere
Carl Legere
Joseph Manga
George Millan
Peter Morelli
Daniel Rava
Philip Reinhardt
Tim Roche
Pat Spano
John K. Williams
G. Woodward

APPENDIX B
Opinion and Judgment of 3rd Circuit Court of Appeals

Argued February 12, 1974

Before Van Dusen and Adams, *Circuit Judges,* and Huyett, *District Judge*

Alfred J. Hill, Esq., Wilentz, Goldman & Spitzer, Perth Amboy, New Jersey
Attorneys for Petitioners in No. 73-1377

Robert M. Saltzstein, Esq. and Jeffrey S. Dubin, Esq., Mirkin, Barre, Saltzstein & Gordon, Great Neck, New York
Attorneys for Petitioner in No. 73-1442

David Friedland, Esq., Jersey City, N.J.,
Attorney for Intervenor in No. 73-1377

Peter G. Nash, General Counsel;
John S. Irving, Deputy General Counsel;
Patrick Hardin, Associate General Counsel;
Elliott Moore, Deputy Associate General Counsel;
William H. DuRoss, III, Attorney;
John M. Flynn, Attorney
National Labor Relations Board

OPINION OF THE COURT
(Filed May 23, 1974)

Van Dusen, *Circuit Judge.*

This case is before this court upon the petitions of Suburban Transit Corporation ("Suburban"), H.A.M.L. Cor-

poration ("H.A.M.L."), and United Transportation Union, Lodge No. 1589 ("UTU") to review and set aside a decision and order of the National Labor Relations Board (hereinafter "NLRB" or "Board") issued against Suburban and H.A.M.L. on May 4, 1973, and reported at 203 N.L.R.B. No. 69. The Board has cross-applied for enforcement of that order. This court has jurisdiction pursuant to §10(e) and (f) of the National Labor Relations Act, as amended (hereinafter "Act"). 29 U.S.C. §160(e) and (f).

The unfair labor practice charges, which resulted in the Board's order in this case, were filed by the Highway and Local Motor Freight Drivers, Local No. 701, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") in October and November of 1971. As amended and consolidated,[1] the complaint filed by the Board under Section 10(b) of the Act, 29 U.S.C. §160(b), alleged that Suburban violated (A) §§8(a)(1) ad 2) of the Act by executing a new collective bargaining agreement with UTU while a question concerning representation existed, (B) §§8(a)(1) and (3) by virtue of the fact that said contract contained a union-security provision, (C) §8(a)(1) by making threats to certain striking employees, and (D) §§8(a)(1)

1. Before the Board Suburban and H.A.M.L. attacked the order consolidating these cases, contending that the two companies do not constitute a single employer within the meaning of §2(2) of the Act. However, the Board found that they did constitute a single employer and Suburban and H.A.M.L. now challenge that finding. It is well settled that this question is for the Board to determine and where businesses are under common ownership, control and management, they may be considered as a single employer. See *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 227 n.2 (1949); *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 577-78 (6th Cir. 1965); *NLRB v. National Shoes, Inc.*, 208 F.2d 688, 691 (2d Cir. 1953). The record in this case reveals that Suburban's sole owner is Morris Lipschitz; its officers are Morris Lipschitz and his two sons-in-law, Lee Jacobs and Sidney Kuchin; and its directors are Morris Lipschitz, his wife, Lillian Lipschitz, and his nephew Herman Lipschitz. The owners and sole officers and directors of H.A.M.L. are Jacobs, Kuchin, and Herman Lipschitz. *We therefore hold that there is substantial evidence to support the Board's finding of a single employer.*

and (3) by discharging those employees. The complaint also alleged that H.A.M.L. violated (A) §§8(a)(1) and (2) by executing a contract with UTU at a time when UTU did not represent an uncoerced majority of H.A.M.L.'s employees and by assisting UTU in its organizing drive, (B) §§8(a)(1) and (3) by the inclusion of a union-security provisions in said contract, and (C) §8(a)(1) by acts of surveillance of and assistance to union activities.[2]

On the basis of this complaint, the Board filed a petition for an injunction under §10(j) of the Act on January 24, 1972. Thereafter, extensive hearings were conducted by the Administration Law Judge, the transcript of which was forwarded to the district court and made a part of the injunction proceeding by agreement of the parties. Following oral argument and submission of briefs, the district court on July 26, 1972, rendered an opinion and order denying the Board's application for injunctive relief. See *Balicer v. Suburban Transit Corp.*, unpublished opinion of 7/28/72 (Civil No. 158-72, D. N.J.).[3] The Administrative Law Judge issued his decision on November 27, 1972, in which he found that Suburban and H.A.M.L. violated §§8 (a)(1), (2) and (3) of the Act as charged in the complaint, and he incorporated a proposed order. On May 4, 1973, a three-member panel of the Board affirmed the findings and conclusions of the Administrative Law Judge and adopted his recommended order.

2. "8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ."

3. We note that in this opinion the district court found that there was not even "reasonable cause" to believe that Suburban and H.A.M.L. violated §§8(a)(1), (2), and (3).

I. *Charges Against Suburban*

UTU has represented Suburban's employees for approximately 30 years.[4] In July 1971, UTU requested that bargaining for the terms of a new contract commence as the then current agreement was due to expire on September 14, 1971. In late August, Suburban employee Daniel Rava was elected chairman of UTU's bargaining committee, which also included employees Peterson and Bowman. Although not officially members of the committee, Gerald McPhillips, a UTU international representative, and Austin Zechman, a UTU vice president, assisted the committee in its deliberations. Suburban was represented by Morris Lipschitz, officer, director and sole owner of Suburban, Lee Jacobs and Sidney Kuchin, the two other Suburban officers, and Ronnie Kohn, Suburban's office manager.

After a series of bargaining sessions, the parties reached accord on September 13 on a three-year agreement. On September 14 a ratification meeting at which the employees decisively rejected the proposed contract by a vote of 49 to 3, apparently because of its three-year term. Following this meeting, the UTU committeemen agreed to bargain for a shorter, two-year contract term. However, at the next bargaining session on September 24, Suburban insisted upon a three-year contract, but offered to increase its initial wage offer. The subsequent ratification meeting, attended by about 30 Suburban employees, broke up in chaos when the term of the contract was announced and no ratification vote was taken. After the meeting, McPhillips met with Rava and Peterson, and they all agreed

4. UTU was formerly known as the Brotherhood of Railway Trainmen, Lodge No. 993. Suburban had a collective bargaining relationship with the Brotherhood starting in 1942. The last contract between the two parties ran from September 15, 1968, to September 14, 1971. At some time during the term of that contract, UTU became the successor to the Brotherhood and assumed and administered the aforesaid collective bargaining agreement.

that they had not had a fair opportunity to present the package to the men and that they should meet with Suburban again.

As early as July 1971, Rava and, at some time during that summer, several other employees, had become interested in the possibility of changing union representation from UTU to the Teamsters. Between July and September, Rava called the Teamsters on several occasions to explore avenues of having the Teamsters represent the Suburban employees. In early September, he and employee Manga met with Martin McDermott, a Teamsters international representative, at the Teamsters' premises. McDermott agreed to check to see if there was a "no raid pact" with the UTU but warned that the Teamsters could be of no help until the contract expired. Thereafter, Rava called the Teamsters several times and was told by McDermott that there not not a "no raid pact" between the Teamsters and UTU.

On the morning of September 15, Rava requested that Peterson meet him at the Teamsters' premises, where they discussed with McDermott ways in which a change in union representation could be effected. During this meeting, McDermott gave Rava a decertification petition and some Teamsters' membership cards, which Rava placed in the trunk of his car. Later that day, Peterson informed McPhillips of the meeting with McDermott. McPhillips the advised UTU vice-president Kenneth Moore of Rava's contacts with the Teamsters, and Moore requested that McPhillips obtain further information before having Rava removed from his union office.

On September 26, Rava gave the decertification petition and Teamsters' authorization cards to Manga, who proceeded to solicit signatures. After obtaining signatures of

more than 30% of Suburban's employees, Manga filed the petition for decertifying UTU on September 29, and the Teamsters filed a representation petition the same day. Suburban received the petitions on October 2.

On September 28, Suburban officials and the UTU bargaining committee met again and agreed that it would be useless to hold another membership meeting. The mediator suggested that a petition be drawn up and that members of the committee speak to each employee, and if a majority signed the petition, then the committee could sign the contract. Rava opposed the petition and suggested instead a mail ballot, which was finally agreed upon. That night, however, while Peterson was in a meeting with Zechman at the latter's home, Moore called Zechman and told him that Rava was collaborating with the Teamsters and that he was taking steps to have Rava removed as chairman of the wage committee. Zechman began to suspect that Rava's suggestion of the mail ballot was designed to cause further delay and, therefore, he and Peterson decided to proceed with a petition.

The contract ratification petition was drawn up and circulated on October 1 by Peterson and another UTU official, Tom Alexander, and was returned to Zechman on October 2 with 51 signatures (out of the 61 employees constituting the unit of drivers). McPhillips contacted Suburban president Lipschitz and told him that the committee believed they had a majority and were prepared to sign a renewal agreement. The signatures on the petition were checked against the payroll forms and were found to be valid. Lipschitz agreed to sign the contract when he returned from a trip to California, and on October 14 the contract was executed.

On the evening of October 26, a meeting was held at the Teamsters' hall and a group of Suburban employees

voted to strike, apparently to protest both the discharge of two workers because of an unrelated accident and the execution of the contract with UTU. The next day, and for a few days thereafter, a number of Suburban employees went out on strike and began picketing the company's premises, with signs reading "Employees of Suburban Transit on Strike Unfair Labor Practices Local Teamsters Union No. 701." The number of employees who picketed is disputed, estimates ranging from 25 to 46. At most only 17 employees worked on the first day of the strike. On October 29, Suburban wrote 34 letters to striking employees, stating that they would be suspended if they did not report for work on November 2. On November 1, Suburban obtained a temporary restraining order from the Superior Court of New Jersey. While most of the employees returned to work on November 2, 19 did not. Following an investigation conducted by Suburban, all but two of the 19 strikers were discharged.

The Board's conclusion that Suburban violated §§8(a)(1), (2), and (3) of the Act was based primarily on its finding that the decertification petition filed by Manga and the representation petition filed by the Teamsters (supported by authorization cards) raised a real question concerning representation and that, therefore, Suburban's execution of a new contract with UTU, containing a union security provision, when Suburban had knowledge of those petitions, was an unfair labor practice under the doctrine of *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945).[5]

5. In its findings of fact, the Board related Rava's undisputed testimony that Morris Lipschitz told him that he should work with Peterson and Zechman to get the UTU petition signed, that if 50 or 90 per cent of the employees signed it, "that would knock the Teamster petition right out of the box," and that if Rava did help, he "would be in with the company one thousand per cent." However, the Board did not rely on that testimony and at no point in its discussion of Suburban's unfair labor practices did it allude to the possibility that the alleged statement by Lipschitz constituted unlawful employer interference in the employees' selection of a bargaining agent.

The Board recognized that this finding conflicts with our decision in *NLRB v. Swift & Co.*, 294 F.2d 285 (3d Cir. 1961), where this court held that the mere filing of a representation petition by a competing union does not create a real question of representation so as to prevent an employer from entering into an agreement with the previously certified union, but the Board felt constrained to follow its own law on this point. We, in turn, are constrained to follow *Swift* and, therefore, hold that the Board's determination that a real question of representation existed at the time of the renewal agreement between Suburban and UTU is not supported by substantial evidence. *See also NLRB v. Peter Paul, Inc.*, 476 F.2d 700, 702 (9th Cir. 1972); *NLRB v. Midtown Service Co.*, 425 F.2d 665, 669 (2d Cir. 1970); *NLRB v. North Electric Co.*, 296 F.2d 137, 139-40 (6th Cir. 1961); *St. Louis Independent Packing Co. v. NLRB*, 291 F.2d 700, 704 (7th Cir. 1961).[6]

As to discharge of the 19 striking employees, the Board's finding of a violation of §§8(a)(1) and (3) of the Act

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6. Because of our holding on this issue, it is unnecessary for us to review the Board's conclusion that Rava's dual role as chief negotiator for UTU and collaborator in the Teamsters' organizing effort was of no legal significance. Nevertheless, we wish to record our strong disapproval of the ethics of such activities by Rava while an official of the UTU, involving, as they appear to have done, the type of conflict of interest that makes it highly improbable that a union representative could fully carry out his responsibilities to his union and to his fellow employees. *Cf.* §501(a) of the Landrum-Griffin Act, 29 U.S.C. §501(a):

> "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization . . . to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization . . . ."

See also *Ford Motor Co. v. Hoffman*, 345 U.S. 330, 338 (1953), where the Supreme Court stated: "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents."

was based upon the premise that the strike was protected activity, despite the possible applicability of a no-strike clause in the bargaining agreement, because the Board found it was called, at least in part, to protest an unfair labor practice— *i.e.*, the execution of the new agreement between Suburban and UTU. Since we have held that the evidence does not support the Board's finding that this agreement constituted an unfair labor practice, its conclusion that the discharge of the strikers violated §§8(a)(1) and (3) must also be set aside and the case must be remanded to the Board for a determination as to whether the strike was protected activity in light of Article 13 of the bargaining agreement.[7] *Cf. Gateway Coal Co. v. United Mine Workers*, 42 U.S.L.W. 4095 (U.S., Jan. 8, 1974).

II. *Charges Against H.A.M.L.*

H.A.M.L. began operations in 1968, and until November 1971, its employees were not represented by a union. On November 1, H.A.M.L. employee Langdon contacted the Teamsters' representative McDermott to discuss organizing H.A.M.L. employees. On the evening of November 2, H.A.M.L. employees Coudray, Rayhon and Langdon met with McDermott ad Rava, obtained Teamsters' authoriza-

7. Article 13 covers the grievance procedure, and it is noted that subparagraph F contains this provision:

"F. Recourse to outside tribunals will not be made by either party until the Grand Lodge of the Union has been advised and given a reasonable opportunity to intervene and dispose of or adjust the situation as the case may be. This, with the understanding that there shall be no authorized strike during such period the dispute is pending under the discussion with either the local lodge or the Grand Lodge."

In its preamble, the agreement also contains this language:

"The purpose of this agreement is to create a definite understanding between Suburban and the Union regarding rates of pay and working conditions and to establish a plan for the prompt adjustment of grievances and all other disputes arising between Suburban and the Union."

tion cards from McDermott, and began soliciting signatures the following morning, November 3.

Suburban's former dispatcher, Harold Bien, testified that at 7:30 A.M. on November 3, H.A.M.L.'s manager, Patrick Kilcoyne, called on the telephone and told him that the Teamsters were organizing H.A.M.L.'s employees. Bien then told Zechman, who was present with Bien during the telephone conversation, what Kilcoyne had said, and Zechman allegedly replied, "[W]e'll have to go down there and organize them." Zechman then dictated UTU authorization cards and proceeded to Suburban's office, where he duplicated them on Suburban office equipment. Shortly thereafter, he recruited H.A.M.L. employees Lobmayer, Alexander and Thomas to assist in the UTU campaign and began soliciting signatures in H.A.M.L.'s garage.

Bien also testified that at about 11:30 that morning, he called Jack Flanagan, H.A.M.L.'s dispatcher, to request that drivers be made available for the New York City runs. According to Bien, Flanagan replied: "I am going to have to cut you a couple short. We are down here getting people signing cards." Furthermore, H.A.M.L. employee Schorr testified that when he returned to the H.A.M.L. garage following his afternoon run, Flanagan asked his to see someone in the drivers' room, and that when he went there, Lobmayer solicited his signature for a UTU authorization card.

Later that afternoon, Lobmayer and the othe UTU organizers determined they had a majority of employees signed up for UTU, having 40 signed authorization cards out of approximately 50 to 55 employees. They then notified Zechman, who in turn called H.A.M.L. vice president Kuchin and requested recognition for UTU. At about 6 P.M., Kuchin called Kilcoyne and told him to be available.

At about 7:30 P.M., Kuchin called the home of Suburban's manager, Kohn, where a party was in progress, and told Kilcoyne to come to Suburban's offices. Kilcoyne and his wife, who were among the guests, left the party with Kohn and went to Suburban's offices. Awaiting them there were Zechman, Kuchin and H.A.M.L. president Jacobs, as well as the newly appointed UTU bargaining committee of Alexander, Bascocky, Lobmayer, and Fayda. Before their arrival, Kuchin had checked the UTU authorization cards and had identified 35 of the signatures. Having determined that UTU represented a majority of the employees, Kuchin extended recognition to it.

At the beginning of the meeting, Zechman stated that "it was important to get the contract signed, negotiated and signed so we could get it in before the Teamsters, certainly." Thereafter, using the October 14 Suburban-UTU contract as a model or guide, the parties negotiated between 8:00 P.M. and 1:30 A.M. As each portion of the contract was agreed upon, Mrs. Kilcoyne typed that part. Finally, at the conclusion of the session, the contract was signed by the H.A.M.L. officers and then was taken to a motel where UTU vice-president Moore was staying. After a brief discussion, Moore executed the contract for UTU. At work later that morning, Bien asked Kilcoyne how everything had gone in regard to the contract and Kilcoyne replied, "All signed, sealed and delivered."

On the basis of the foregoing facts, the Board concluded that H.A.M.L. violated §§8(a)(1), (2), and (3)of the Act by unlawfully assisting UTU in organizing its employees and then executing and maintaining a contract with UTU containing a union security provision. Although we accept, as supported by the evidence, the Board's decision to credit the testimony of Bien where contradicted by that

of Zechman and Flanagan,[8] and its finding that Flanagan is a supervisor,[9] we agree with H.A.M.L.'s contention that the facts by the Board fail to establish that H.A.M.L. gave unlawful support or assistance to the UTU organizing drive.

We are mindful that "where, as here, we are in agreement that substantial evidence supports the Board's findings, our scope of review is limited to determining whether the Board's factual inferences are so irrational they cannot stand, and whether, if they stand, they justify the Board's order." *Department Store Food Corp. of Pennsylvania v. NLRB*, 415 F.2d 74, 77 (3d Cir. 1969). Nevertheless, this contention merits close examination because the Board conceded that "the evidence of direct assistance in obtaining signatures on the mimeographed UTU 'authorizations' is not particularly strong," and therefore could conclude only that H.A.M.L. "gave at least tacit approval to and benevolent observation of, the UTU organizers at HAML's garage" (32a). The law is clear, however, that cooperation between an employer and a union does not violate but rather accords with the policy of the Act. An unfair labor practice occurs only when the employer's acts of assistance for a union interfere with the right of the

8. Zechman denied having any conversation with Bien on the morning of November 3 concerning the Teamsters' organizational drive or Zechman's intention to go down to H.A.M.L. to organize on behalf of UTU. Flanagan testified that although he did call Bien on November 3 (as he normally did several times a day), he merely told Bien of rumors that one of the unions was signing up men. H.A.M.L. argues that the Board should not have believed the contrary testimony of Bien, since he was biased against H.A.M.L., having been summarily dismissed from his job as dispatcher and was financially obligated to the Teamsters and Rava, having received an interest-free loan from them at about the same time he decided to testify for the Teamsters.

While it thus appears that there may be reason to doubt Bien's credibility, "it is not our task to resolve questions of credibility of those who testify at the Board hearings." *NLRB v. Local 420, Plumbers*, 239 F.2d 327, 328 (3d Cir. 1956). After a careful review of the record, we conclude not to disregard the reasoned evaluation by the Administrative Law Judge of the credibility of the various witnesses.

9. See pp. 19-20, *infra*.

employees fairly to choose their representative. And as one court has observed, "the line between 'close cooperation' and 'interference with the freedom of choice of the employees' is a delicate one and often difficult to maintain, particularly where rival unions are involved." *NLRB v. Hunter Outdoor Products, Inc.*, 440 F.2d 876, 880 (1st. Cir. 1971).

In its decision, the Board placed heavy emphasis on the haste with which H.A.M.L. recognized UTU as the representative of its employees and concluded a contract with it. In light of H.A.M.L.'s knowledge of the Teamsters' drive,[10] the Board adopted the opinion and, therefore, the reasoning of the Administrative Law Judge that such haste constituted an attempt by H.A.M.L. to favor UTU, and there is language in that opinion suggesting that this fact alone established an unlawful interference with the right of the employees to choose their own representative.[11] We do

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10. There seems to be substantial evidence in the record to support the Board's finding that H.A.M.L. was aware of the Teamsters' organizing effort. H.A.M.L. appears correct that the Board erred in finding that Zechman told *everyone* present at the negotiating session that it was important to get the contract signed to beat out the Teamsters; Zechman's testimony was that he made that statement not only to Fayda but to the "entire committee," that is, the UTU bargaining committee, not H.A.M.L.'s representatives (898a–N.T. 1484). However, as we observed above, the Board could credit Bien's testimony concerning his conversation with Kilcoyne about the Teamsters' drive on the morning of November 3, and could reasonably infer from H.A.M.L.'s haste in recognizing UTU and executing a contract with it that H.A.M.L. knew of the Teamsters' effort and was trying to thwart it. On the other hand, we do not know whether the Board would have made this finding if it had understood correctly Zechman's testimony.

11. "The scenario of that night, [November 3] almost without more, indicates that HAML was exerting every effort to keep Teamsters from becoming the employees' bargaining representative. [29a]

. . .

"This is not a straight Midwest Piping case, for the contract was executed before the Teamsters petition was filed, without any claim to represent the employees having been made by the Teamsters. But the law does not permit an employer, in circumstances such as these, to recognize one of two competing unions when the recognition is designed to keep the other union from obtaining representations rights. UTU's role in the affair was not, of course, illegal. As Zechman said, UTU wanted a

not believe that by itself it is an unfair labor practice for an employer to grant quick recognition to a union and to negotiate a hasty contract where that union represents an uncoerced majority of the employees,[12] even if the employer is motivated by the desire to freeze out a rival union. The issue before us is not the employer's state of mind but the effect of its actions on the rights of the employees. *Cf. International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961).[13] "So long as the acts of cooperation do not interfere with the freedom of choice of the employees, there is no violation of the Act." *NLRB v. Keller Ladders Southern, Inc.*, 405 F.2d 663, 667 (5th Cir. 1968). Where a union has achieved the support of a majority of the employees without coercion or unlawful assistance on the part of the employer, its recognition by the employer and the negotiation and execution of a collective bargaining agreement are precisely the sort of cooperation that it

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contract signed as quickly as possible for the express purpose of keeping the Teamsters from filing a petition. If UTU had won a legitimate race to achieve a majority among HAML's employees, with the Teamsters never getting off the ground, then the race would really be to the swift (no pun intended). But the blatant haste by HAML in cooperating with UTU's efforts to freeze out the Teamsters is just the kind of assistance the law prohibits." [31a-32]

12. In the context of the present argument, UTU may be treated as representing an uncoerced majority of H.A.M.L.'s employees. Although the Board noted in its decision that between six and ten employees signed UTU authorization cards after having already signed Teamsters cards, it did not find that UTU did not in fact represent a majority of H.A.M.L.'s employees. The Board's objection to UTU's claim of majority status was that UTU had received unlawful assistance from H.A.M.L. in obtaining a majority of signatures. It now points out in its brief that several employees testified that when they were approached by Lobmayer and told him that they had signed Teamsters cards earlier that day, he represented that the UTU cards were just for an election. H.A.M.L., on the other hand, contends that it is incredible that those employees could have misunderstood what the UTU cards meant. As noted above, it is not this court's task to decide issues of credibility. Since the Board made no finding on this issue, we have no reason to assume that those signatures were obtained as a result of fraud or misrepresentation on the part of Lobmayer.

13. The Supreme Court held in *I.L.G.W.U. v. NLRB*, *supra*, that an employer who recognizes a minority union commits an unfair labor practice notwithstanding a good faith belief on his part that it has majority support.

is the policy of the Act to foster.[14] Although we reject the Board's suggestion that H.A.M.L.'s haste in recognizing UTU and negotiating a contract with it, without more, would violate the Act, the Board could reasonably infer from such haste that H.A.M.L. preferred to have its employees represented by UTU rather than the Teamsters, and could properly evaluate the other actions of the employer in the light of that preference in determining whether unlawful assistance had been given to the preferred union. See *NLRB v. Keller Ladders Southern, Inc., supra* at 667.

Turning to the remaining evidence, we note that all but one of the actions attributed to H.A.M.L. provide only weak support for the Board's finding of unlawful assistance. Kilcoyne's telephone call to Bien on the morning of November 3 indicates that H.A.M.L. had knowledge of the Teamsters' organizing campaign, but can hardly be interpreted as an attempt to encourage a counter-drive by UTU, especially since Zechman's learning of what was said appears to have been fortuitous. Of greater weight is the fact that Zechman duplicated the UTU authorization cards at Sub-

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The Court stated there, "We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved." *Id.* at 739. Following this decision, two circuit courts have held that an employer commits an unfair labor practice if he recognizes a union which his employees have been coerced to support, even if he has no knowledge of that coercion. *NLRB v. Hunter Outdoor Products, Inc., supra* at 879; *NLRB v. Jan Power, Inc.*, 421 F.2d 1058, 1063 (9th Cir. 1970).

14. In its decision, the Board relied on *NLRB v. Hunter Outdoor Products, Inc., supra* at 880, where the First Circuit said:

"Particularly where an employer is aware of organizing efforts by a rival union, it acts at its peril in according hasty recognition when one union claims majority support . . . . The most prudent course for Hunter [the employer] under the circumstances would have been to petition for a Board-conducted election pursuant to §9(c) of the Act."

The situation in *Hunter*, however, is distinguishable in that there the union claiming majority status had used coercive tactics to obtain employee signatures on its authorization cards and the company had used coercive tactics in helping that union maintain its majority support. Thus, the above-quoted excerpts from *Hunter* must be read to mean that an employer acts at his peril when he accords recognition to a union which turns out not to represent an uncoerced majority of the employees. This is not the case here. See note 12, *supra*.

urban's office and on Suburban's equipment; however, the inference that the management of Suburban "permitted" Zechman to do this is weakened by the absence of any evidence that it ever knew what Zechman was doing. Similarly, Flanagan's telling Schorr that someone in the drivers' room wanted to speak to him suggests a possibility of cooperation with the UTU drive, since that was where the UTU organizers were soliciting sigatures. However, that fact can hardly support the Board's conclusion that "[w]hen the drivers came in to the HAML facility, they were directed by chief dispatcher Flanagan to the UTU representatives . . . ." Schorr seems to have been the only employee to testify that he was "directed" to the drivers' room, and even if is can be reasonably inferred that Flanagan knew who wanted to see Schorr and for what purpose, there is no evidence that Flanagan's actions had any coercive effect.[15]

We are left, then, with Flanagan's statement to Bien on the morning of November 3: "I am going to have to cut you a couple short. We are down here getting people signing cards." By itself that statement does not establish a violation of the Act, since the record demonstrates that the Teamsters was also soliciting signatures that day and thus any decision to curtail dispatching drivers would have benefited both unions. Moreover, even viewing Flanagan's statement together with the weaker evidence of assistance discussed above and in light of H.A.M.L.'s preference for

15. In *Department Store Food Corp. of Pennsylvania* v. *NLRB*, *supra*, this court upheld the Board's conclusion that it was an unfair labor practice for an employer to direct new employees to a union representative during the checking-in process. We reasoned that in such a situation those employees could reasonably believe that, as a condition of employment and as part of the checking-in process, the company wanted them to sign the union's authorization cards and that the company's assistance thus impaired the employee's right to choose freely whether or not they wanted to join the union. In this case, H.A.M.L.'s employees were not subjected to any comparable pressure.

UTU, as shown by the haste with which the company recognized and negotiated with that union, we do not believe that this evidence establishes such direct support and assistance to UTU as to interfere with the employees' freedom of choice. Thus, we conclude that H.A.M.L. did not violate §§8(a)(1), (2), and (3) of the Act in according recognition to UTU and in concluding a contract with it that contained a union security provision.

The Board also found that H.A.M.L. committed an independent violation of §8(a)(1) of the Act by requesting an employee to engage in surveillance of the union activities of other employees, and we hold that this finding is supported by substantial evidence on the record. H.A.M.L. employee Coudray testified that during the afternoon of November 5, Flanagan asked him to spy at a Teamsters' meeting that night. Coudray went to the meeting and reported back to Flanagan the followig morning, and was allegedly told to call Kilcoyne and tell him what had occurred. Kilcoyne testified that Coudray did in fact call him and tell him about the meeting, although he replied to Coudray that the information was unsolicited, that he really was not interested, and that he had given instructions to Flanagan not to get involved with the union business but to stay out of it and just do his own job.

It is well established that surveillance of the type described by Coudray is conduct prohibited by §8(a)(1) of the Act. See *NLRB v. Historic Smithville Inn*, 414 F.2d 1358, 1359-60 (3d Cir. 1969), *cert. denied*, 397 U.S. 908 (1970); *NLRB v. Fishman & Sons*, 278 F.2d 792, 796 (3d Cir. 1960). However, H.A.M.L. argues that the Board erred in crediting Coudray's testimony. After a careful review of the record, including the Administrative Law

Judge's discussion of this point,[16] and in view of our extremely limited role in reviewing the credibility of Board witnesses, *NLRB v. Local 420, Plumbers, supra* at 328, we find this argument to be without merit.

H.A.M.L. also contends that the finding by the Board that Flanagan is a supervisor is not supported by the evidence and that his actions were, therefore, not attributable to H.A.M.L. We disagree. Although there is some evidence suggesting employee status,[17] it does not compel such a finding, for the record also indicates that Flanagan is salaried, is the sole dispatcher for H.A.M.L.'s 55 drivers, has authority to assign overtime and determine whether to send drivers to Suburban from H.A.M.L. when requested by Suburban's dispatchers or officials, is the person whom employees call when they are unable to work, occasionally adjusts minor grievances, and performs some of Manager Kilcoyne's functions when the latter is absent

16. After considering the fact that Coudray did call up Kilcoyne and tell him about the meeting, the Administrative Law Judge said:

"I cannot conceive of Coudray at that time attempting to build up a case against HAML by calling Kilcoyne, as he did, and manufacturing a story about Flanagan having told him to call. I must conclude, accordingly, that Flanagan did so tell him."

H.A.M.L. now argues, since the contract between H.A.M.L. and UTU had already been executed the day before, that there was no reason for Flanagan or anyone else to have Coudray spy on a Teamsters' meeting on November 5. This argument is not persuasive. H.A.M.L. might very well have wanted to know what actions the employees supporting the Teamsters planned to take in response to that contract.

17. It is undisputed that Flanagan had no authority to hire, fire, or otherwise discipline employees, or to fix working conditions such as vacations, holidays, or hours of work; only Kilcoyne had such authority. In addition, Flanagan testified that he drove a bus fairly regularly, was paid hourly like the drivers, and received the same rate of pay, attended no supervisory meetings, received the same vacation and fringe benefits as the drivers, did not participate in the negotiation of the contract, was not paid if he was out sick, holds no stock in H.A.M.L., did nothing without Kilcoyne's approval, and did not feel part of the management. Since the Administrative Law Judge found Flanagan's credibility suspect on other matters (30a, n.19), he was, of course, free to determine to what extent he would credit Flanagan's testimony on this issue.

For the foregoing reasons, the petition for enforcement will be granted as to that part of the Board's order concerning H.A.M.L.'s violation of §8(a)(1) of the Act for having requested an employee to engage in surveillance of the union activities of other employees. As to all other matters, the petition for enforcement will be denied and the petition for review granted. The case will be remanded to the Board for further proceedings not inconsistent with this opinion.

Adams, *Circuit Judge*, dissenting:

The symbolic relationship between legal norms and factual contexts appears perhaps in its starkest form in the field of labor law. The principles governing the affairs of employers and employees have largely evolved through attempts by legislatures, courts, and administrative tribunals to contain within a comprehensible set of rules the complicated undulations of labor-management-relations. Since our understanding of the usually complex factual situations is acquired through a detached perusal of a written record, it is not surprising that, on occasion, we, as judges, differ as to the applicable legal principles. Separate opinions, like mine in the instant case, seem an inevitable product of the intricate tapestry of rule and fact constituting the law in this field.

Thus, while I agree with the majority's disposition of the charges of unfair labor practice against Suburban, I disagree with its conclusion that the activities of H.A.M.L. surrounding the recognition of UTU and its subsequent expedited negotiation of a collective bargaining agreement with UTU did not constitute an unfair labor practice.

I. *The Unfair Labor Practice Rulings Against Suburban*

As for the decision with respect to Suburban, since the administrative law judge expressly disavowed this Court's reasoning and result in *Swift* and since he offered no factual basis apart from Suburban's awareness of the decertification petition for a conclusion that the employer believed that a real question of representation existed, I am constrained to agree with the majority that Suburban did not commit an unfair labor practice in reaching an agreement with UTU while the decertification petition was pending.

Swift holds in essence that the filing of a decertification petition and "an administrative determination that a hearing thereon should be held" is not sufficient evidence to establish the employer's belief that a real question of representation exists. In *Midwest Piping*, the Board had held, prior to *Swift*, that once a representation petition had been filed with the Board, the employer's act in recognizing one of two competing unions amounted to "unlawful assistance . . . which interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in section 7 of the Act." Despite some degree of agreement with the *Swift* rule in other circuits,[1] the Board has continued to decide cases on the basis of the *Midwest Piping* rationale.

The concerns underlying the Board's resistance to the *Swift* rule and, thus accounting for its adherence to the *Midwest Piping* doctrine, are not altogether illusory. The doctrine according to the Board, is but "a direct outgrowth of the parent doctrine of employer neutrality in matters relating to employees' choice of bargaining representatives."[2] The doctrine promotes the general objective of

1. *See, e.g.*, NLRB v. Midtown Service Co., 425 F.2d 665, 669 (2d Cir. 1970); Getman, The *Midwest Piping* Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma, 31 U. Chi. L. Rev. 292 (1964).
2. NLRB v. National Container Corp., 211 F.2d 525, 536 (2d Cir. 1954).

preserving the employees' free choice in several ways. First an election would appear to be a better test of employee sentiment than authorization cards or other, less formal evidence that an incumbent union retains majority status.[3] Second, once an employer has recognized and begun to bargain with one of two competing unions, the legitimacy thereby likely conferred in the eyes of some employees on the chosen union makes it very difficult, in subsequent Board proceedings, if any there be, to determine whether the chosen union had attained majority status prior to the act of recognition.[4] Hence, the *Midwest Piping* doctrine serves as a prophylactic device insofar as it discourages recognition prior to a Board-conducted election, thereby avoiding the subtle effects pre-election recognition may well have on employee sentiment.

However, several policy considerations support the *Swift* doctrine. First, permitting the employer to continue to bargain with an incumbent union avoids the disruption in the collective bargaining process occasioned by insubstantial claims to majority status asserted by nonincumbent unions. Second, assuming that the incumbent union does, in fact, enjoy majority status, the employees' wishes are, in effect, frustrated during that period required to conduct the representation election which *Midwest Piping* mandates in cases when a representation petition has been filed. Third, some would contend that labor-management relations have matured over the years to the extent that the danger of the successful establishment of a union which is unduly solicitous of the employer's wishes and needs is minimal and, therefore, the evils of premature recognition

3. *See* NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969); Note, Union Authorization Cards, 75 Yale L.J. 805 (1966).

4. *But cf.*, Getman, The *Midwest Piping* Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma, 31 U. Chi. L. Rev. 293, 305-311 (1964).

and continued bargaining with an incumbent union whose majority status has been challenged by a representation petition are mitgated.

None of the factors tending to support rejection of the *Swift* rule are of recent vintage. This Court in *Swift* no doubt weighed these considerations in reaching its decision. Therefore, it would not appear appropriate, at least at this time, to question the rule.

2. *The Unfair Labor Practice Against H.A.M.L.*

The H.A.M.L. situation is somewhat different. The H.A.M.L. workers were not represented by any union be fore November 3, 1971. At that time, UTU and the Teamsters were both engaged in organizational efforts. There is no indication in the record, apart from the usually suspect authorization cards, whether UTU had attained, at any time, actual majority status. The Board's order with respect to H.A.M.L. required the employer, *inter alia*, to refrain from treating UTU as its employees' representative. The enforcement of this order appears to be the prelude to a Board-conducted election.

Thus, the *Swift* rule and the *Midwest Piping* doctrine, which deals with petitions *to decertify* an existing union, are somewhat inapposite. Instead, we must resort to more pristine standards for determining whether the employer's recognition of UTU constituted illegitimate assistance to that union, standards largely unsullied by the conflicting glosses of *Swift* and *Midwest Piping*.

Section 7 of the National Labor Relations Act guarantees employee-free choice in the selection of a bargaining representative as well as the right to reject all putative representatives. The employer's awareness that a representation dispute exists is some evidence that its action in

recognizing one of the disputants prior to an election interfered with the employees' section 7 rights or contributed to the support of the chosen union.[5] Yet, *Swift* makes clear that if such an awareness is acquired solely through the filing of a representation petition, bargaining with the incumbent union does not amount to an unfair labor practice.

It is arguable, however, that when there is a closely contested representational dispute in a bargaining unit previously unrepresented, such as that comprised of H.A.M.L. employees, the impact of recognition on employee freedom of choice is perhaps more devastating than when an employer merely continues to bargain with an incumbent union despite the existence of a decertification petition. Nevertheless, when employer awareness of a representational disput and its subsequent recognition of one of the competing unions are coupled with a finding of acts that tend to favor one of two rival unions or to render suspect the employers' motivations in recognizing one of the unions, it becomes difficult to conclude that the employer has not interfered with employee choice.

In the case at hand, the administrative law judge relied primarily on the unusual haste surrounding the acquisition of an authorization card majority, the quickness of the employers' recognition, and the swiftness of the negotiation of a collective bargaining agreement. The majority concludes that the rapid pace of these events did not interfere with the employees' freedom of choice because the UTU represented an uncoerced majority of the workers. This assertion of uncoerced majority status is founded solely upon the authorization cards submitted by UTU to H.A.M.L. Viewed against the questionable reliability of authorization cards as an indication of employer sentiment,

5. 29 U.S.C. §158(a)(1) & (2).

I cannot regard the frantic efforts on the part of UTU and H.A.M.L. as "precisely the sort of cooperation that it is the policy of the Act to foster." [6] Instead, the circumstances surrounding the negotiations between H.A.M.L. and UTU, coupled with other factual findings of the administrative law judge, would seem sufficient to support the Board's inference that H.A.M.L.'s actions had the effect of interfering with the employees' freedom of choice.

The majority appears to agree that other findings of the administrative law judge are "supported by substantial evidence on the record considered as a whole." [7] Findings that H.A.M.L. knew about the Teamsters' organizational activities and that H.A.M.L. suggested that UTU begin to organize in response thereto, do, in my judgment, shed substantial light on the intended and, in all probability, actual effects of the expedited recognition and negotiations.

Despite the concession by the administrative law judge that "the evidence of direct assistance in obtaining signatures on the mimeographed UTU 'authorizations' is not particularly strong," there appears to exist a sufficient factual predicate to support a conclusion that H.A.M.L.'s assistance to UTU amounted to a violation of sections 8(a)(1) and 8(a)(2). Also, because of the existence of a union security provision in the contract, there would seem to be a rational basis for the conclusion that section 8(a)(3) has been violated as well.

In sum, I cannot conclude that "the Board's factual inferences [with respect to H.A.M.L.] are so irrational they cannot stand. . . ." [8] Thus, I would permit enforcement

6. Majority Opinion at 16.
7. 29 U.S.C. §160(f); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
8. Department Store Food Corp. v. NLRB, 415 F.2d 74, 77 (3d Cir. 1969).

of the Board's order to the extent it is intended to remedy unfair labor practices committed by H.A.M.L.

In all other respects, I join the opinion of the majority.

A TRUE COPY:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

Before: VAN DUSEN and ADAMS, Circuit Judges, and HUYETT, District Judge.

THESE CAUSES came on to be heard upon petitions filed respectively, by Suburban Transit Corp. and H.A.M.L. Corporation and United Transportation Union, Lodge No. 1589 to review a certain order of the National Labor Relations Board issued against Petitioners, Suburban Transit Corp. and H.A.M.L. Corporation, their officers, agents, successors, and assigns on May 4, 1973, and upon the Board's cross-application to enforce its Order. The Court heard argument of respective counsel on February 12, 1974, and has considered the briefs and transcript of record filed in this case. On May 23, 1974, the Court being fully advised in the premises handed down its opinion denying in part, remanding in part and granting in part enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, H.A.M.L., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Requesting any employee to keep under surveillance the union activities of other employees.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in New Brunswick, New Jersey, at places where notices to employees are customarily posted,

copies of the notice attached hereto marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 22, N.L.R.B. (Newark, New Jersey), after being duly signed by Petitioner's representative, shall be posted by Petitioner immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

BY THE COURT

/s/ Van Dusen
VAN DUSEN
Circuit Judge

DATED: July 22, 1974

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

an Agency of the United States Government

WE WILL NOT request any employee to spy on the union activities of other employees.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by the National Labor Relations Act.

H.A.M.L. CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building—16th Floor, 970 Broad Street, Newark, N.J. 07102 Telephone (201)645-2100.

APPENDIX C
(Text of Statutes Cited)

LABOR MANAGEMENT RELATIONS ACT.

29 U.S.C. 151 et seq.

Pertinent sections included are:

29 U.S.C. 158(a)(1)(2) and (3)

29 U.S.C. 159(c), (d) and (e)

29 U.S.C. 160(e) and (f)

Sections 8(a)(1)(2) and (3)

Sections 9(c)(d) and (e)

Sections 10(e) and(f)

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer

from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

REPRESENTATIVES AND ELECTIONS

Sec. 9. (e)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their em-

ployer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor orgaization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the pur-

poses and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or, restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure

to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case

of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

SUPREME COURT, U. S.

FILED
NOV 19 1974
MICHAEL RODAK, JR., CLERK

No. 74-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

—versus—

SUBURBAN TRANSIT CORPORATION AND H.A.M.L. CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF ON BEHALF OF UNITED TRANSPORTATION UNION, LODGE NO. 1589

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INDEX

PAGE

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Statutes Involved 3

Statement 4

I. Suburban Transit Corporation 4

II. H.A.M.L. Corporation 6

Argument 6

Conclusion 8

Addendum 9

TABLE OF AUTHORITIES

Cases:

American Bread Co. v. NLRB, 411 F2d 147, 155, (C.A.6 1969) 7

Cleaver-Brooks Mfg. Co. v. NLRB 264 F2d 637, (C.A. 1959), Cert. Denied 361 U.S. 815 (1959) 7

I.L.G.W.U. v. NLRB 366 U.S. 731 (1961) 7

Iowa Beef Packers v. NLRB 331 F2d 176, (C.A.8 1964) 7

Mid West Piping & Supplying Company 63 NLRB 1060 (1945) 7

NLRB v. Air Master Corp., 399 F2d 553, (C.A.3 1964) 7

NLRB v. North Electric Co., 296 F2d 137 (C.A. 6 1961) 7

NLRB v. Peter Paul, Inc., 467 F2d 700 (C.A.9 1972) 7

NLRB v. Signal Oil & Gas Co., 303 F2d 785 (C.A. 5 1962) 7

NLRB v. Standard Steel Spring, 180 F2d 942 (C.A. 6 1960) 7

NLRB v. Swift & Co., 294 F2d 285, (C.A. 3 1961) 7

Playskool, Inc. v. NLRB, 82 LRRM 2916 (C.A.7 1973) 7

St. Louis Independent Packing Co. v. NLRB 291 F2d 700 (C.A.7 1961) 7

Statutes:
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.)
Section 7 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

--versus--

SUBURBAN TRANSIT CORPORATION and H.A.M.L. CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To the United States Court of Appeals For The Third Circuit

BRIEF ON BEHALF OF UNITED TRANSPORTATION UNION, LODGE NO. 1589

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 42a–68a)[1] is reported at 499 F2d 78. Although the United Transportation Union, Lodge No. 1589, (herein the UTU), appeared as an appellant[2] in the Court of Appeals, the petitioner failed to designate the UTU in the caption of its petition for a Writ of Certiorari. The decision and order of the National Labor Relations Board (herein the Board) is reported at 203 NLRB No. 69 (Pet. App. 1a–41a).

[1] *"Pet. App." refers to the appendix to the petition.*

[2] *The UTU's petition on appeal No. 73-1442 was consolidated with the petition, No. 73-1377, filed by Suburban Transit Corporation and H.A.M.L. Corporation.*

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1974. The petition for Writ of Certiorari was filed October 21, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Was the Court of Appeals correct in determining that the execution of collective bargaining agreements by Suburban Transit Corporation (herein Suburban) and H.A.M.L. Corporation (herein H.A.M.L.) with the UTU did not constitute unfair labor practices within the meaning of the National Labor Relations Act?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 29 U.S.C. Sec. 151, et seq.), are set out at pp. 70a-76a of the petition.

STATEMENT

I. Suburban Transit Corp.

Suburban is a bus company which operates along routes authorized by the Interstate Commerce Commission and the New Jersey Public Utilities Commission.

Suburban has had a collective bargaining relationship with the UTU and its predecessor, the Brotherhood of Railroad Trainmen, Lodge No. 993, since 1942. The parties most recent collective bargaining agreement ran from September 15, 1968 to September 14, 1971. Sometime in July, 1971, Suburban employees Daniel Rava and Joseph Manga visited the offices of the Highway and Local Motor Freight Drivers Local No. 701, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (herein the Teamsters) for the purpose of discussing the possibility of changing from the UTU to the Teamsters.

In the beginning of July, 1971, Suburban received the UTU's demands for a new contract.

After a series of negotiation sessions, on September 14, an employee membership meeting was held at which time a contract package was presented to the gathered employees. In the course of this meeting, the contract package was rejected and the employees voted to strike.

On September 15th, Rava, who was then chairman of the UTU negotiating committee, contacted the Teamsters to explore avenues of future Teamsters representation of Suburban employees.

At the next bargaining session, held on September 15, at the urging of the State Mediator, the contract was extended on a

day to day basis. At the subsequent negotiation session held on September 24, Suburban's representatives accepted the mediator's recommended wage package but Rava opposed a three year contract term and the proposals relating to part-timers.

A chaotic employee membership meeting was held on September 24, at which time the UTU's negotiating committee agreed that they had not had a fair opportunity to present the contract package to the employees. Another meeting was held on September 28, at which time it was agreed that the package would have been accepted if the membership had listened to it. In the course of this meeting, Rava opposed a suggestion by the mediator to the effect that the contract be executed upon the receipt of a ratification petition signed by a majority of the employees. Rather, Rava suggested and it was agreed that mail ballots be authorized to determine the employees' sentiments concerning the proposed contract.

In the evening of September 24, UTU Local President Zechman, having determined that Rava was collaborating with the Teamsters, authorized the circulation of a contract ratification petition. On October 2, a contract ratification petition signed by an overwhelming majority of the bargaining unit employees was presented to Suburban. Having checked the validity of the aforementioned petition, Suburban's President, Lipshitz, who was then leaving for California, agreed to sign the contract when he returned. The contract with the UTU was executed on October 14, 1971, effective September 15, 1971.

In the meantime, and unbeknownst to Suburban, Manga, at the request of Rava, solicited signatures on Teamsters authorization cards and on a decertification petition and filed a decertification petition with the Board on September 29th. This same day, a Teamsters' representation petition was filed with the Board.

II. H.A.M.L. Corporation

H.A.M.L. is a bus company that commenced operations in 1968. Until November, 1971, its employees were not represented by any labor organization. On November 3, 1971, both the UTU and the Teamsters commenced organizational campaigns of H.A.M.L.'s employees.

In the late afternoon of November 3, after having secured authorization cards from two-thirds of the bargaining unit employees, the UTU requested recognition from H.A.M.L. Having first checked and verified the UTU's claim of majority status, H.A.M.L. extended recognition and commenced negotiating a collective bargaining agreement with UTU representatives. At approximately 2:00 A.M. on November 4, H.A.M.L. and the UTU concluded their negotiations and executed a collective bargaining agreement.

In the meantime, in the evening of November 3, the Teamsters sent a telegram to H.A.M.L. requesting recognition. On November 4, 1971, the Teamsters filed a representation petition with the Board. However, H.A.M.L. received no communications from the Teamsters although it did receive papers from the Board several days after the signing of the contract with the UTU.

ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with the decision of other Courts of appeals. No issue warranting review is presented.

Contrary to the position of the Petitioner, the decisions of the Circuit Court of Appeals are not in conflict as to the

application of what is known as the Board's Mid West Piping Doctrine. In *Mid West Piping & Supplying Company* 63 NLRB 1060 (1945) the Board in essence held that an employer violates the Act when at the time it executes a collective bargaining agreement, there exists a real question concerning the representation of the employees in question.

Upon considering the application of the Board's Mid West Piping Doctrine, the Courts of Appeal have reviewed such cases in light of the particular facts of each case. Specifically the Courts have reviewed the Board's records on appeal to determine if the finding of the existence of a real question concerning representation is supported by substantial evidence.

In situations such as the instant one, the Courts of Appeals have denied enforcement of Board orders where the record on appeal did not contain substantial evidence to support the Board's finding of a real question concerning representation. *Playskool, Inc.* v. *NLRB*, 82 LRRM 2916 (C.A.7 1973); 83 LRRM 2544 (C.A.7 1973); *NLRB* v. *Peter Paul, Inc.*, 467 F2d 700 (C.A.9 1972); *American Bread Co.* v. *NLRB*, 411 F2d 147, 155, (C.A.6 1969); *NLRB* v. *Air Master Corp.* 339 F2d 553, (C.A.3 1964); *Iowa Beef Packers* v. *NLRB* 331 F2d 176, (C.A.8 1964); *NLRB* v. *North Electric Co.*, 296 F2d 137 (C.A.6 1961); *NLRB* v. *Swift & Co.*, 294 F2d 285, (C.A.3 1961); *St. Louis Independent Packing Co.* v. *NLRB* 291 F2d 700 (C.A.7 1961); *Cleaver-Brooks Mfg. Co.* v. *NLRB* 264 F2d 637, (C.A. 1959), cert. denied 361 U.S. 815 (1959); and *NLRB* v. *Standard Steel Spring* 180 F2d 942 (C.A.6 1960).

Such cases as *I.L.G.W.U.* v. *NLRB* 366 U.S. 731 (1961) and *NLRB* v. *Signal Oil & Gas Co.*, 303 F2d 785 (C.A. 5 1962) are inapposite. In *I.L.G.W.U.* v. *NLRB*, supra, the Supreme Court held that the employer violated the Section 7 rights of its employees when in a rival union situation, it had granted initial

recognition to a minority union. Unlike the instant situation, the employer in *I.L.G.W.U.* v. *NLRB* had no objective criteria upon which to accord the recognition to either of the rival unions involved.

NLRB v. *Signal Oil & Gas Co., supra* is also clearly distinguishable from the instant case. In *Signal Oil & Gas Co.*, the Court of Appeals enforced the Board's order upon finding that there was substantial evidence to support the conclusion that "...a serious question as to representation existed, which imposed on the company a duty to postpone collective bargaining until it could be ascertained which (labor) organization was the actual representative" of the employees. The Court therein was constrained to enforce the Board's order in view of the testimony of the incumbent union's President which was to the effect that when the rival union filed its petition for an election, the incumbent union was then uncertain of the representational interests of its own membership. Such was not the situation in the instant matter.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: November 15, 1974.

ADDENDUM

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et al.) are as follows:

* * * * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

NOV 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-460

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

SUBURBAN TRANSIT CORPORATION AND H.A.M.L. CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statutes Involved 2

Statement 2

ARGUMENT:

The Court below correctly applied the prior law in its circuit, as well as the law in other circuit courts 4

Conclusion 11

CASES CITED:

Abrams v. Carrier Corp., 434 F.2d 1234 (2nd Cir. 1970) 6

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971) 9, 10

American Bread Company v. NLRB, 411 F.2d 147 (6th Cir. 1969) 6

Cleaver-Brooks Mfg. Corporation v. NLRB, 264 F.2d 637 (7th Cir. 1959) cert. den'd 361 U.S. 817 (1959) 6

District 50, United Mine Workers of America v. NLRB, 234 F.2d 565 (4th Cir. 1956) 6

Ensher, Alexander and Barsoom, Inc., 74 NLRB 1443 (1947) 4

TABLE OF CONTENTS

CASES CITED:

Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL), 346 U.S. 485 (1953) 10

International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) 8, 9

Iowa Beef Packers v. NLRB, 331 F.2d 176 (8th Cir. 1964) 5-6

Midwest Piping and Supply Company, 63 NLRB 1060 (1945) 3, 4, 8, 9, 10

Modine Manufacturing Company v. NLRB, 453 F.2d 292 (8th Cir. 1971) 6

NLRB v. Air Master Corporation, 339 F.2d (3rd Cir. 1964) 7

NLRB v. Indianapolis Newspapers, 210 F.2d 501 (7th Cir. 1954) 6

NLRB v. Midtown Service Company, 425 F.2d 665 (2nd Cir. 1970) 6

NLRB v. North Electric Company, 296 F.2d 137 (6th Cir. 1961) 6

NLRB v. Peter Paul, Inc., 467 F.2d 700 (9th Cir. 1972) 5

NLRB v. Signal Oil and Gas Company, 303 F.2d 785 (5th Cir. 1962) 8, 9

NLRB v. Standard Steel Spring Co., 180 F.2d 942 (6th Cir. 1950) 6

TABLE OF CONTENTS

CASES CITED:

NLRB v. Swift & Company,
294 F.2d 285 (3rd Cir. 1961) 4, 5

NLRB v. Wheland Company,
271 F.2d 122 (6th Cir. 1959) 6

Playskool, Inc. v. NLRB,
477 F.2d 66 (7th Cir. 1973) 7

St. Louis Independent Packing Company v. NLRB,
291 F.2d 700 (7th Cir. 1961) 5

San Diego, Building Trades Council,
Millmens' Union, Local 2020, Building
Material and Dump Drivers, Local 36 v. Garmon,
359 U.S. 236 (1959) 9, 10

William Penn Broadcasting Co.,
93 NLRB 1104 (1951) 5

STATUTES CITED:

National Labor Relations Act, as amended
(61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) 2

Section 7, NLRA 10

Section 8, NLRA 10

28 U.S.C. 1254(1) 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-460

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

SUBURBAN TRANSIT CORPORATION AND H.A.M.L. CORPORATION,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 42-66) is reported at 499 F.2d 78. The decision and order of the National Labor Relations Board (Pet. App. 1-41) are reported at 203 NLRB 69.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 67-68) was entered on July 22, 1974. The petition for a writ of certiorari was filed on October 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Was the Court of Appeals correct in deciding, in conformity with all other reviewing courts, that the execution of the collective bargaining agreement by respondent with the incumbent union was not an unfair labor practice in that there was no question concerning representation?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet App. 70-76.

STATEMENT

The collective bargaining agreement between Suburban Transit Corporation, herein called Suburban or Respondent,[1] and United Transportation Union, Lodge No. 1589, herein called UTU, expired September 14, 1971. Negotiations for a new contract took place during August and September, 1971. The chief negotiator for UTU was Rava, who, during this period of time and unbeknown to UTU, was seeking ways to replace UTU with petitioner. Suburban's proposals were rejected by the employees on September 14, 1971. A membership meeting on September 24, 1971 became chaotic and broke up due to the conduct of a few employees. On September 28, 1971, there was general agreement between the parties that Suburban's proposals would have been accepted if the employees had listened to them. The mediator suggested that a petition be drawn up; that members of the

1. Although H.A.M.L. Corporation is also a named respondent, no question was raised in the petition for a writ regarding the findings of the Court of Appeals for the Third Circuit in connection with the H.A.M.L. case.

negotiating committee speak to each employee, and if a majority signed the petition, the committee could sign the contract. Rava was the sole person to oppose such a petition. That evening, the UTU representative advised that due to Rava's collaboration with petitioner, he was being removed as chairman of the UTU negotiating committee. Thereupon, a petition was prepared and several UTU negotiating committee members circulated same to the employees and explained Suburban's proposals. On October 1, 1971, fifty-one signatures were obtained on the petition, which was turned over to the UTU representative on October 2, 1971. Since fifty-one employees in the unit of sixty-six had signed the petition, the committee advised Suburban on October 2, 1971 that the majority approved the proposals and that the committee was prepared to sign a renewal agreement. A check by Suburban determined that the signatures were valid. The contract was executed October 14, 1971. In the meantime, petitioner had filed a representation petition on September 29, 1971. Suburban received said petition on October 2, 1971, the same day as it was presented with the UTU petition.

Pursuant to charges filed by petitioner, the Administrative Law Judge, as well as the Board's Division of Judges, found that the contract between Suburban and the UTU was in violation of *Midwest Piping and Supply Company*, 63 NLRB 1060 (1945). Upon appeal, the Third Circuit of the United States Court of Appeals reversed the Board's finding in this regard.

ARGUMENT

The Court below correctly applied the prior law in its circuit, as well as the law in other circuit courts.

1. The sole ground advanced by petitioner for a writ deals with the application of the doctrine espoused by the Board in *Midwest Piping and Supply Company, supra.* In that case, the Board found that the Company violated the National Labor Relations Act, herein called the Act, by entering into an agreement with one union at a time when there existed a question concerning representation of the employees. The inquiry underlying the application of the *Midwest Piping* doctrine is whether there exists a question concerning representation.

The Third Circuit made its position clear in *NLRB v. Swift & Company,* 294 F.2d 285 (3rd Cir. 1961). In the *Swift* case, the Board, relying on the *Midwest Piping* doctrine, found that the filing of a petition by a rival union raised a question concerning representation and that renewal of the agreement with the incumbent union constituted a violation of the Act. In determining whether there existed a question of representation, the Third Circuit was guided by what the Board itself said while referring to the *Midwest Piping* doctrine in *Ensher, Alexander and Barsoom, Inc.*, 74 NLRB 1443, 1445 (1947):

> "that doctrine, necessary though it is to protect freedom of choice in certain situations, can easily operate in derogation of the practice of continuous collective bargaining and should, therefore, be strictly construed and sparingly applied."

The Court decided that there was no real question of representation established merely from a showing of

the filing of a petition and an administrative determination that a hearing should be held. Accordingly, the Court denied the Board's petition for enforcement of its order and stated that the Board's finding of an unfair labor practice must fall in the absence of substantial evidence in the record to support the finding that the employer had a reasonable basis for believing that the incumbent no longer represented a majority of its employees. Likewise, Suburban had no reasonable basis to believe that the UTU no longer represented a majority of its employees. This was amply demonstrated when the UTU petition to accept the contract was signed by 51 out of a total of 66 employees.

Shortly before the Third Circuit's decision in *Swift*, the Seventh Circuit held in *St. Louis Independent Packing Company v. NLRB*, 291 F.2d 700 (7th Cir. 1961) that the mere filing of representation petitions and the holding of a hearing by the Board was insufficient to establish a question concerning representation. In *William Penn Broadcasting Co.*, 93 NLRB 1104 (1951), the Board held that the pendency of a petition does not impose a duty upon an employer to refrain from continuing to recognize and deal with the incumbent union.

Later, the Ninth Circuit, in *NLRB v. Peter Paul, Inc.*, 467 F.2d 700 (9th Cir. 1972), stated that the Board's reliance on the *Midwest Piping* doctrine was misplaced. In denying enforcement of the Board's order, the Court adopted the *Swift* philosophy in a case similar to Suburban. The employer there signed a contract with the incumbent union after receiving knowledge of the filing of a petition by an outside union. The Court held that there was no question of representation and that the employer's contract with the incumbent was proper. The same view was expressed by the Eighth Circuit in *Iowa Beef Pack-*

ers v. NLRB, 331 F.2d 176 (8th Cir. 1964); the Second Circuit in *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2nd Cir. 1970) and *NLRB v. Midtown Service Company*, 425 F.2d 665 (2nd Cir. 1970); and the Sixth Circuit in *NLRB v. North Electric Company*, 296 F.2d 137 (6th Cir. 1961).

In *Cleaver-Brooks Mfg. Corporation v. NLRB*, 264 F.2d 637 (7th Cir. 1959), *cert. den'd* 361 U.S. 817 (1959) the Court, in setting aside the Board's order, held that no question concerning representation existed and that the company's recognition of one of two rival unions was proper, where the recognized union had established that it represented thirty-five out of a possible forty-seven employees. This was found to be a clear showing of majority representation. The United States Supreme Court denied the Board's petition for Writ of Certiorari. 361 U.S. 817 (1959). The Sixth Circuit concluded likewise in *American Bread Company v. NLRB*, 411 F.2d 147 (6th Cir. 1969) where the recognized union had procured one hundred and seventy cards out of the unit of two hundred ninety-five employees.

Again in *NLRB v. Standard Steel Spring Co.*, 180 F.2d 942 (6th Cir. 1950), the Court denied enforcement of the Board's order, and held that the Company's recognition of one union was proper, despite the pending petition before the Board. To the same effect is the Eighth Circuit opinion in *Modine Manufacturing Company v. NLRB*, 453 F.2d 292 (8th Cir. 1971); the Sixth Circuit ruling in *NLRB v. Wheland Company*, 271 F.2d 122 (6th Cir. 1959); and the Fourth Circuit holding in *District 50, United Mine Workers of America v. NLRB*, 234 F.2d 565 (4th Cir. 1956).

In *NLRB v. Indianapolis Newspapers*, 210 F.2d 501 (7th Cir. 1954), the Court, in denying enforcement to the

Board's order, found that where one of two competing unions submitted to the company a petition bearing signatures of more than sixty percent of the employees in the unit, the company's recognition of said union was proper and no unfair labor practice had been committed. In fact, the Court stated that:

> "Once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees" (page 503-504).

Likewise, in *NLRB v. Air Master Corporation*, 339 F.2d 553 (3rd Cir. 1964), the Court found that recognition of one of two competing unions or contracting with it was not an unfair labor practice where a clear majority of employees, without subjection to coercion or other unlawful influence, made manifest their desire to be represented by a particular union. The court there appropriately stated:

> "It is interference with the employees' choice, not frustration of the Board's design to hold an election, which the statute proscribes as an unfair labor practice. And the latter is not necessarily determinative of the former. Indeed, a Board conducted election is merely a means for expressing a free choice. If such a choice has in fact been made manifest and the employer honors it, the purpose of an election has been accomplished" (at page 556).

Recently in *Playskool, Inc. v. NLRB*, 477 F.2d 66 (7th Cir. 1973), the Court denied enforcement of the Board's order. It reiterated that:

> "The courts (of appeal) have generally refused to find a violation of Section 8(a) (2) where an employer

> has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support (citing numerous cases)" (at page 70).

The foregoing demonstrates the uniformity of approach by all of the Circuit Courts when confronted with the *Midwest Piping* doctrine.

2. In support of petitioner's contention that there exists a conflict among the courts, he cited *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) and *NLRB v. Signal Oil and Gas Company*, 303 F.2d 785 (5th Cir. 1962). Even the most brief examination of these two cases demonstrates that such claim is invalid. *Garment Workers'* involved recognition of a minority union. The entire decision dealt with a discussion of the good faith of the company in extending such recognition and that such good faith was no defense since the Act prohibits employer support of a minority union. The Supreme Court held, however, that:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election."

In *Signal Oil*, the Company signed a contract with the incumbent union after a rival union claimed that it represented a majority of the employees and filed a petition. The Court found that a question concerning representation existed since no one knew as of the execution of the contract whether the incumbent commanded the allegiance of a majority of the employees. The basis for the Court's ruling was the testimony of the president of the incumbent union:

> "We were undecided how the majority of our people stood, whether they were behind our Federation (the incumbent), or whether they were behind OCAW (the rival)."

The Court in *Signal Oil* cited *Garment Workers'* in stating that an employer has the duty to take reasonable steps to verify representation claims of the union with which it proposes to negotiate a collective bargaining agreement. Once those steps are taken, and a union proves its majority status to an employer, it is at least permissible, if not mandatory, for the employer to bargain and contract with the majority union. Neither *Garment Workers* nor *Signal Oil* is to the contrary. Neither case conflicts with the numerous cases cited above in any respect, including that of the burden of proof requirement, as claimed by petitioner. In all of the cases referred to above, including the instant matter, the Circuit Courts have uniformly held that when a union claims majority status, submits proof of same and the employer verifies such majority status, the employer may lawfully recognize and contract with such majority union.

3. Petitioner cited *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971) and *San Diego Building Trades Council, Millmens' Union, Local 2020, Building Material and Dump Drivers, Local 36, v. Garmon*, 359 U.S. 236 (1959) in support of his theory that these two cases conflict with the resistance offered by the Circuit Courts to the *Midwest Piping* doctrine. In essence, petitioner contends that activities arguably subject to Sections 7 and 8 of the Act are exclusively in the Board's province; and that Courts of Appeal should not intrude into this area and reverse Board policies and findings.

Garmon involved a State Court action for an injunction and damages as a result of peaceful picketing. The United States Supreme Court found that since it was arguable that the union activity came within Section 7 or 8 of the Act, state jurisdiction was displaced; and the Board was the exclusive primary tribunal to adjudicate the question. *Lockridge* involved a court suit against a union by a union member who was suspended from union membership because of an arrearage in his payment of union dues. The United States Supreme Court, in applying the rule of *Garmon,* stated that both federal and state court jurisdiction was pre-empted because the union's conduct was arguably protected or prohibited by the Act.

Respondent recognizes the concept of *Garmon* and *Lockridge;* however, it is inapposite here. This case was not instituted in the federal or state court. Rather, it began before the Board and, like every other court case above cited dealing with the *Midwest Piping* doctrine, it was subject to review; and the Third Circuit, after review, rendered the judicial decision in conformity with the other Circuit Courts on that issue.

The concept of pre-emption and exclusivity of Board jurisdiction in matters arguably subject to the Act applies to primary jurisdiction. It does not bar judicial review of Board decisions. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL),* 346 U.S. 485 (1953).

Indeed, there is no conflict among the various Circuit Courts, either as between themselves or with the United States Supreme Court. They all have applied generally the law of the *Swift* case so long as the recognized union held a majority, free from coercion or unlawful influence. The Board is unwilling to accept this proposition uniformly applied by the courts, and therein lies the problem. Nevertheless, that does not constitute a proper basis for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ for certiorari should be denied.

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Attorneys for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-460

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

SUBURBAN TRANSIT CORP. AND H.A.M.L. CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board held, *inter alia,* that respondent Suburban Transit Corp. ("Suburban") violated Section 8(a)(1) and (2) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (2), by entering into a new collective bargaining agreement with the United Transportation Union ("UTU") despite knowledge that representation petitions—supported by at least 30 percent of the employees in the bargaining unit—had been filed by the Teamsters[1] and an individual, Joseph Manga. The Board applied its *Midwest Piping* doctrine, 63 NLRB 1060, which holds that it is unlawful for an employer to recognize one of two

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[1]Highway and Local Motor Freight Drivers Local No. 701, affiliated with International Brotherhood of Teamsters.

competing unions where "a real question of representation is pending before the Board" (Pet. App. 13a-22a). The Board, *inter alia,* ordered Suburban to cease recognizing or contracting with "UTU", unless and until "UTU" has demonstrated its representative status in a Board-conducted election (Pet. App. 33a). The court of appeals, concluding that the filing of the representation petitions were not sufficient to create a "real question of representation," declined to sustain the Board's unfair labor practice finding and to enforce its order (Pet. App. 48a-49a).[2]

2. The Board believes that the court of appeals erred in rejecting its view that the filing of a representation petition which has sufficient merit to trigger formal proceedings raises a "real question of representation," so that an employer violates its duty of neutrality by recognizing one of two competing unions before the representation question has been resolved by the Board. The instant case does not, however, provide a good factual setting in which to present the underlying legal issue to this Court, since the chief negotiator for "UTU" was also a collaborator in the Teamsters' organizing effort (see Pet. App. 45a-48a, 49a, n. 6).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

DECEMBER 1974.

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[2]The court followed its earlier decision in *National Labor Relations Board* v. *Swift & Co.*, 294 F. 2d 285 (C.A. 3), where it held that the filing of a representation petition by a rival union plus the Board's administrative determination that a hearing thereon should be held do not, by themselves, afford the employer a reasonable basis for believing that the incumbent union no longer represents a majority, and thus render continued recognition of that union unlawful.